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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1150

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, and CALNEV PIPE-LINE COMPANY, a Corporation,

Petitioners,

vs.

DORIA MINING AND ENGINEERING CORPORATION, a Corporation, CECIL D. ANDRUS, etc., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinions and Decisions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Which the Case Involves	3
Statement of the Case	4
Reasons for Granting the Writ	10
I. Where the Administrative Record as a Whole Clearly Supports the Agency Decision and Where the Alleged Fraud as to Which Judicial Review Is Sought Does Not Reach the Core of a Case nor the Agency Decision, Review Should Be Denied in the Interest of Finality of Decisions and Avoidance of Trials De Novo in the District Courts	10
II. Where the Alleged Tainted Evidence Does Not Go to the Core of a Mining Contest and Where Other Evidence in the Record Amply Supports the Agency Decision, the Integrity of the Process Is Not so Compromised as to Require a Hearing on Charges of Fraud	16
Conclusion	19
Appendix A. Opinion	App. p. 1
Appendix B. Memorandum of Decision Granting Defendants' Motion for Summary Judgment	10

Page

Appendix C. Opinion by Administrative Judge Ritvo 15

Appendix D. 28 U.S.C. § 1331(a) 42

Appendix E. 30 U.S.C. § 22 43

30 U.S.C. § 35 43

30 U.S.C. § 611 43

Appendix F. 5 U.S.C. § 706 45

TABLE OF AUTHORITIES CITED

Cases Page

Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604 (1978) 6

Clear Gravel Enterprises, Inc. v. Keil (9th Cir. 1974) 505 F.2d 180 14

Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115 (1956) .. 16

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944) 16

Humboldt Placer Mining Co. v. Sec'y of the Dept. of Interior (9th Cir. 1977) 549 F.2d 622 .....15, 17

Interstate Investors, Inc. v. United States, 287 F. Supp. 374 (S.D.N.Y. 1968) 12, 13

Multiple Use Inc. v. Morton (9th Cir. 1974) 504 F.2d 448 10

Standard Oil Co. v. Montedison, SpA (3d Cir. 1976) 540 F.2d 611 11

United States v. Coleman, 390 U.S. 599 (1968) 18

United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957) 16

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 10

Regulations

Code of Federal Regulations, Title 43, Sec. 4.450-1 5

Rules

Federal Rules of Civil Procedure, Rule 60(b)(3) 12

Statutes	Page
United States Code, Title 5, Secs. 701-706	3, 5, 6
United States Code, Title 5, Sec. 706(2)(E)	10
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1331	5, 6
United States Code, Title 28, Sec. 1331(a)	3
United States Code, Title 28, Sec. 2200	5
United States Code, Title 30, Sec. 22	3
United States Code, Title 30, Sec. 35	3
United States Code, Title 30, Sec. 611	3
United States Code, Title 35, Sec. 146	11

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Respondents.

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Petitioners, the State of California, acting by and through the Department of Transportation and Calnev Pipeline Company, a corporation, hereafter jointly referred to as "Petitioners," pray that a Writ of Certiorari issue to review the judgment and opinion in the above-entitled cause of the United States Court of Appeals for the Ninth Circuit.

The principal respondent herein is Doria Mining and Engineering Corporation, a corporation (hereafter "Doria"). Respondents Cecil D. Andrus, Secretary of the Interior, Douglas Leisz as Regional Director of the United States Forest Service and Harold Mitchell as Acting Forest Supervisor of the San Bernardino National Forest (hereafter, the "federal respondents") were appellees below, but did not join in the Petition

for Rehearing of the Opinion of the Court of Appeals, and have not joined in this Petition. Federal respondents, like Doria, have a continued interest in the outcome of this case by reason of the intervention of the United States in the mining contest proceeding more fully described *infra*.

Opinions and Decisions Below.

The Opinion and Judgment of the Court of Appeals for the Ninth Circuit, not yet reported, appears in Appendix "A" of this Petition.

The Memorandum of Decision of the District Court for the Central District of California Granting Defendants' Motion for Summary Judgment is reported at 420 F.Supp. 837. A copy of said Decision appears in Appendix "B" of this Petition.

The decision of the United States Department of Interior Board of Land Appeals (hereafter "IBLA") which affirmed the decision of an Administrative Law Judge declaring respondent Doria's 18 unpatented placer mining claims null and void for lack of discoveries of valuable mineral deposits, is reported at 17 IBLA 380-401. A copy of said IBLA decision, with headnotes omitted, appears in Appendix "C" of this Petition.

Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit was entered on November 2, 1979. A timely petition for rehearing filed by Petitioners was denied on December 19, 1979, and this Petition for Certiorari was filed within 90 days of said date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether, in an action for judicial review of an agency decision invalidating mining claims, the alleged newly discovered evidence of fraud on the agency tribunal, *aliunde* the administrative record, but intrinsic to the agency hearing, is sufficient to warrant consideration by the Court where the record as a whole reveals no discovery of valuable minerals was made by locators of the claims.

2. Whether, in the action above-described, considering the administrative record as a whole and disregarding certain evidence in the agency hearing challenged as "tainted," any injustice to a party would result from the denial of a Motion to Amend a Complaint for judicial review to allege newly discovered evidence of fraud *aliunde* the record, where the party's own evidence at the hearing failed to make a showing of discoveries of valuable mineral deposits under the General Mining Law.

Statutes Which the Case Involves.

1. 28 U.S.C. § 1331(a) providing subject matter jurisdiction for the action below, set forth in Appendix "D" hereof.

2. The General Mining Law of May 10, 1872, as amended, in particular 30 U.S.C. §§ 22 and 35, and the Surface Resources Act of July 23, 1955, in particular 30 U.S.C. § 611, all as set forth in Appendix "E" hereof.

3. The Administrative Procedure Act, 5 U.S.C. §§ 701-706 and in particular 5 U.S.C. § 706 set forth in Appendix "F" hereof.

Statement of the Case.

Since 1955 respondent Doria, or its predecessors, claimed possessory interests in eighteen placer mining claims located on federal lands in the Cajon Pass region of the San Bernardino National Forest, San Bernardino County, California.

On or about September 26, 1968, the United States of America recorded a Highway Easement Deed to the State of California which granted to the State an easement over lands covered by the mining claims. Pursuant to such recorded easement, the State entered on portions of land covered by the mining claims and constructed the freeway commonly known as Interstate 15.

On or about January 1, 1961, and again on or about March 27, 1970, the United States Department of Agriculture, Forest Service, issued certain Special Use Permits to Calnev Pipeline Company (Calnev) for the construction of pipelines across portions of such federal lands. In 1970, Calnev, pursuant to such Special Use Permits, entered upon and constructed high pressure pipelines across portions of the mining claims.

Both the easement deed granted to the State and the Special Use Permits granted to Calnev were subject to outstanding valid claims, if any, existing on the dates of the grants. Neither the State nor Calnev obtained permission from Doria or any of its predecessors in interest to enter upon the property upon which the mining claims were located.

Based upon the entries by Petitioners onto lands covered by the mining claims, on or about December 10, 1970, Doria filed suit in the Superior Court of

the State of California for the County of San Bernardino, against Calnev Pipeline Company, for trespass and inverse condemnation in respect to the mining claims. On January 5, 1971, Doria filed a second suit in the Superior Court for San Bernardino County against the State for trespass and inverse condemnation in respect to the mining claims.

In 1972 Petitioners filed private contest No. R-4873 in the Department of Interior pursuant to 43 C.F.R. §§ 4.450-1 *et seq.* asserting interests adverse to Doria in the lands on which the claims were located and alleging that the claims were invalid for failure to discover any valuable mineral deposits within the limits of the claims. Prior to the hearing on said contest, the United States intervened on the side of Petitioners as a contestant. After a six-day hearing all 18 claims were declared null and void by Administrative Law Judge Graydon Holt. Doria appealed the decision to the IBLA and on or about October 31, 1974, the IBLA affirmed the decision (17 IBLA 380-401; Appen. "C" to Petition).

On March 12, 1975, Doria filed its Complaint in the United States District Court, Central District of California, for "Review of Decision Invalidating Mining Claims and For Declaratory Judgment of Validity and For Injunctive Relief." [CR 1-9]. Doria alleged jurisdiction pursuant to 28 U.S.C. § 1331, the Administrative Procedure Act (5 U.S.C. §§ 701-706) and the Declaratory Judgment Act (28 U.S.C. §§ 2200 *et seq.*) [CR 2-3]. In answer to the Complaint, Petitioners denied jurisdiction based on the Declaratory Judgment Act, or on 28 U.S.C. § 1331 [CR 20, lines 9-11; CR 27, lines 3-11]. Petitioners alleged and the district court subsequently held that jurisdiction

was based only on 5 U.S.C. §§ 701-706 (Memorandum of Decision, Exh. "B", p. 1).[1]

On April 28, 1975, Petitioners and the federal respondents moved for Summary Judgment and dismissal of Doria's Complaint on the grounds that the entire administrative record in Contest No. R-4873 supported the IBLA decision declaring Doria's mining claims invalid and that moving parties were entitled as a matter of law to have judgment entered affirming the IBLA decision. A certified copy of the Administrative Record was lodged with the district court as Exh. "A" and decisions of the IBLA and the Administrative Law Judge were attached as Exhs. "B" and "C" [CR 77-145]. Doria's opposition to the motion filed on July 30, 1975, did not establish by affidavits or otherwise any genuine triable issue regarding "improper testing methods and false factual premises" utilized by Petitioners' expert witness Schroter as alleged in Doria's complaint for review. Doria's opposition was based on its Memorandum of Points and Authorities, exhibits, consisting only of copies of the administrative decisions, and the "Records, Files and Transcripts of the Agency Proceedings." In opposition to the summary judgment Doria challenged the propriety of the government's intervention in the private contest, the burden of proof applied at the hearing and the sufficiency of the evidence upon which the IBLA concluded there was no discovery of feldspathic sands [CR 188-237].

After the motion was argued, and submitted for decision, Doria filed on April 26, 1976, a Motion

[1]During pendency of the appeal from the judgment of the district court, this Court held in *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604 (1978), that jurisdiction was conferred by 28 U.S.C. § 1331, and not the Administrative Procedure Act. *Id.* 607 at n. 6.

for Leave to Amend its Complaint on the ground of Doria's "recent discovery" on or about April 1, 1976, that the agency decision was "based on perjured and false testimony" allegedly adduced by Petitioners in the contest hearing. The Affidavits and Memorandum in support of the Motion averred that exhibits in evidence at the hearing showing results of tests run on samples taken from Doria's claims "substantially vary and differ from the actual test sheets prepared by the State laboratory;" that said exhibits materially distorted the actual test results and that the State laboratory in conducting the tests on the samples "failed to comply with standard procedures established by the State for all material testing laboratories." Doria allegedly discovered this asserted misconduct after obtaining copies of all the test sheets showing results of tests run on material from the Doria claims [CR 342, 345-349, 351-353]. The proposed amended complaint generally alleged the discovery of "new evidence" which showed that evidence presented by Petitioners at the hearing was "inaccurate, misleading and false and misrepresented the true facts" and that the IBLA decision was "based on erroneous and false facts and information knowingly introduced into said hearing by defendants." [CR 356].

Petitioners and federal respondents opposed the motion, pointing out *inter alia* that the alleged tainted evidence related to a single exhibit, numbered 14A, which was a compilation of results of tests run on the claims for sand and gravel sufficiency at the request of Petitioners' witness Schroter; that the alleged "newly discovered facts" pertaining to said Exhibit 14A were not new but could readily have been ascertained and delved into at the hearing through cross-examination

of witness Schroter, that Doria had already obtained, through State court discovery, copies of 10 laboratory test sheets as early as November 1, 1975, and that in any event as shown by the affidavit of Mr. Schroter, filed in opposition to Doria's motion, the data in Exhibit 14A accurately reported the results of tests run on the samples as reflected in the original State materials laboratory test sheets [CR 394-398].

After hearing the motion, the district court took the matter under submission [CR 442]. As noted by the Court of Appeals (Appen. "A", p. 5, n.2) the district court stated at the hearing that it did not believe it had jurisdiction to consider matters extrinsic to the administrative record. The district court also stated it was about to circulate its decision on the summary judgment motion, thereby doubting the timeliness of Doria's motion (Rep. Tr. Hrg. of 5-17-76, p. 10).

While Doria's motion to amend was pending Doria filed, on May 27, 1976, another motion to "Supplement the Record" regarding its motion to amend the complaint, or in the alternative, to stay the court proceedings pending Doria's request for a rehearing before the Secretary of Interior. Petitioners and federal respondents moved to strike the motion as violative of the court's earlier ruling that the matter was to stand submitted as of May 28, 1976. The district court vacated the noticed hearing date of the second motion [CR 494].

Thereafter, the district court filed its Memorandum of Decision granting Defendants' Motion for Summary Judgment and entered summary judgment affirming the IBLA decision [CR 505-510]. From said judgment Doria appealed and the Court of Appeals rendered its Opinion vacating the summary judgment and remanding to the District Court. The Court of Appeals considered it necessary only to pass on whether the district court erred in denying, on grounds of lack of jurisdiction, Doria's motion for leave to amend its complaint. The Court held that the district court may consider evidence outside the administrative record in determining whether allegations of a fraud on the agency are meritorious, and remanded for further proceedings, including consideration of the merits of Doria's motion (Opinion, Appen. "A", p. 5).

REASONS FOR GRANTING THE WRIT.

I.

Where the Administrative Record as a Whole Clearly Supports the Agency Decision and Where the Alleged Fraud as to Which Judicial Review Is Sought Does Not Reach the Core of a Case nor the Agency Decision, Review Should Be Denied in the Interest of Finality of Decisions and Avoidance of Trials De Novo in the District Courts.

The decision of the Court of Appeals involves an important question regarding the scope of judicial review of an agency ruling. The Court holds it was error for the district court to deny, for lack of jurisdiction, Doria's Motion for Leave to Amend Its Complaint to show alleged fraud (Opinion, Appen. "A", p. 8). The Court of Appeals' rationale is that alleged newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the record and that the district court "may consider evidence extrinsic to the record in determining whether such allegations are meritorious." (Opinion, Appen. "A", p. 5). This conclusion is reached without considering whether from the record as a whole, the alleged tainted evidence really went to the core of the case or would have made any difference in result. In this respect, Petitioners submit that the holding will seriously undermine, if not efface, the well settled rule that the proper standard of judicial review of agency action is whether the agency findings are supported by substantial evidence in the record as a whole. 5 U.S.C. § 706(2)(E); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-491 (1951); *Multiple Use Inc. v. Morton* (9th Cir. 1974) 504 F.2d 448, 452.

The Court of Appeals concededly found no direct authority for its holding, but cited the case of *Standard Oil Co. v. Montedison, SpA* (3d Cir. 1976) 540 F.2d 611 as "instructive." In *Montedison*, a patent interference case in which the plaintiff sought judicial review under 35 U.S.C. § 146 and raised for the first time an issue of fraud in the interference proceeding, the Third Circuit did hold that the district court "in appropriate circumstances . . . may, in such an action, in the exercise of a sound discretion, permit an issue of fraud which infected the Board's determination to be raised though it was not raised in the interference proceeding. . . " *Id* at 617. However, the court further stated in *Montedison* that a district court should not permit the issue to be raised for the first time unless ". . . manifest injustice to the parties and the public will otherwise result. . ." *Id* at 617.

In the case at bench, Petitioners submit that on the record below the Court of Appeals has improvidently tipped the scales in favor of Doria in its concern over "preventing the prejudice to Doria . . . which arises out of circumstances such as those before us [which in the opinion of the Court outweighed] any countervailing interests which administrative agencies and other parties which appear before them may have in the finality of agency decisions. . . ." (Opinion, Appen. "A", p. 8). Citing by analogy the collateral estoppel doctrine, the Court of Appeals further stated that the advantages of finality can only be enjoyed when the aggrieved party has had an adequate opportunity to litigate his claim.

Petitioners submit that as the administrative record herein amply shows, Doria had precisely that opportunity in the presentation of its evidence in the mining

contest. See Summary of Testimony of Doria's seven witnesses at the hearing, Appen. "C", pp. 29-33, [17 IBLA at 392-395]. The alleged fraud which was the basis both of Doria's Motion to Amend and subsequent Motion for Relief Under *Federal Rules of Civil Procedure* 60(b)(3) was clearly intrinsic to the administrative proceeding.[2] It involved solely the reliability of results of tests run on samples taken from the claims by Schroter's crew. Those results, now considered so crucial by Doria, were certainly not accepted at face value by Doria as evidenced by the number of witnesses who testified on Doria's behalf, contrary to Schroter's opinions.

In another case cited by Court of Appeals below, *Interstate Investors, Inc. v. United States*, 287 F.Supp. 374 (S.D.N.Y. 1968), a three judge court decided the merits of a claim to set aside an agency decision for alleged fraud. However, the Court was guided by the following principle therein:

> "Plainly the fact that false or misleading testimony was given during the course of a judicial proceeding does not constitute a fraud upon the court unless it appears that the court was so misled by such testimony as to render a decision based on a mistaken view of the material facts. [Citations] This is of course equally true in an administrative proceeding."
>
> 287 F.Supp. at 382.

[2]The alleged "fraud", if indeed it existed, could easily have been uncovered or probed at the hearing had Doria's counsel desired to pursue on cross-examination the basis of contestants' Exh. 14A which tabulated the test results of samples taken from the claims. In a mining contest, as in any adversary proceeding, a party does not accept adverse evidence because of the supposed "integrity" of an assay or testing laboratory. Nor does an adverse party allow unfounded conclusions by another side's experts. The factual bases of an adversary expert's opinion must, of course, be probed and questioned. If, years after the hearing in a collateral proceeding, it turns out that the evidence was not as solid as it appeared at the hearing, it is too late to rebut it. Under the rubric of "Newly Discovered Evidence of Fraud," this was precisely Doria's tactic in the district court.

In the instant case, the testimony in the administrative hearing as thoroughly reviewed in the IBLA decision, clearly shows that neither the administrative law judge nor the IBLA was so influenced by the results of a single set of tests run on the Doria samples as to render the decision nullifying the claims a miscarriage of justice predicated on a mistaken view of material facts. Regardless of results of tests on the claims, the administrative law judge after reviewing *all* the evidence stated in his decision,

> "The use of material on the claims as of July 1955 for aggregate required a plant or some other means of screening, washing and grading. Although there was water [giving Doria the benefit of the doubt on this point], it had not been developed, there was no processing plant, and the only potential market was the State of California. The State constructed roads across the claims during the two periods but used material from a different area. This falls far short of establishing that there was a market for the sand and gravel on any one of the claims or on the claims as a group on the date that common varieties of sand and gravel were excluded from location. . . ." [CR 40].

Similarly, after its comprehensive review of testimony and exhibits adduced by both sides, the IBLA con-

cluded with respect to the sand and gravel deposits as follows:

> "The evidence presented at the hearing clearly established that the sand and gravel on the subject claims was of inferior quality and was not acceptable for the type of work being done in the relevant market for the period 1955 to the hearing. During that period deposits of superior quality were actively exploited in the area and there was only a limited local demand for sand and gravel. Under such circumstances, no discovery of sand and gravel existed on appellants' claims. (Citation) It is of no consequence that appellant Hutchinson gave material from the claims to his friends at no cost. It has been held that the disposal of substantial quantities of sand and gravel at no profit does not demonstrate the existence of a market for the material which would induce a man of ordinary prudence to expend his means in an attempt to develop a mine on his claims. (Citation)".
>
> (Appen. "C", 17 IBLA at 396).

The fraud issue raised by respondent Doria below was relevant only to the *quality* of materials on the claims for use in building materials. However, as is established by decisions involving sand and gravel locations, the quality of materials on the claims is but one factor in establishing a discovery of valuable mineral deposits. See *Clear Gravel Enterprises, Inc. v. Keil* (9th Cir. 1974) 505 F.2d 180. Other factors which were addressed in depth by the IBLA decision, and found wanting in the Doria claims, are: accessibility of the deposit, its proximity to the relevant markets, the demand for the specific materials on the claims and the locator's bona fide efforts, or lack thereof,

to develop the claims and ability to compete profitably in the market with a product extracted from the claims. In this regard, the following language in the case of *Humboldt Placer Mining Co. v. Sec'y of the Dept. of Interior* (9th Cir. 1977) 549 F.2d 622, in which the court quoted approvingly from an IBLA decision affirming the invalidity of certain placer mining claims located for sand and gravel is particularly applicable herein:

> ". . . Here there was no positive evidence of marketability to overcome the government's prima facie case. Further the determination of the IBLA that the government had made out a prima facie case of lack of discovery was supported by testimony disparaging the quality of the gravel on the claims."
>
> 549 F.2d at 625-626.

In the case at bench there was ample testimony from other witnesses, independent of the challenged test results evidenced by Exh. 14A, that the quality of the Doria deposits was inferior compared with that of established aggregate producers in the San Bernardino and Victorville market areas. See IBLA opinion reviewing the testimony of Messrs. Thwing, Hove and Curtin (Appen. "C", pp. 27-29) [17 IBLA at 391-392]. Indeed, Doria's own expert, Mr. Longfield, characterized the quality of the Doria material as marginal at best and insufficient in and of itself to sustain a mine (Record, Adm. Hrg. 1222, 1241). The foregoing portions of the record independently supported the IBLA decision. The opinion of the Court of Appeals remanding the case to hear the alleged fraud issue thus not only undermines the substantial evidence rule, but is wasteful and unncessary in light of the record presented herein.

II.

Where the Alleged Tainted Evidence Does Not Go to the Core of a Mining Contest and Where Other Evidence in the Record Amply Supports the Agency Decision, the Integrity of the Process Is Not so Compromised as to Require a Hearing on Charges of Fraud.

Understandably, the cases reaching this Court in which the integrity of the record below has been challenged have been very limited in number. In such cases this Court quite properly declined to review the record and remanded the matter to the lower court to determine where the truth lay. *E.g., United States v. Shotwell Manufacturing Co.,* 355 U.S. 233 (1957); *Communist Party of the United States v. Subversive Activities Control Board,* 351 U.S. 115 (1956). In one exceptional case the long-standing, deliberately contrived fraud was so egregious as to call for the equitable remedy of vacating the fruits of a judgment obtained by the fraud long after its perpetration on the governmental agency and the courts. *Hazel-Altas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238 (1944).

In full awareness both of the seriousness of charges of fraud and of this Court's meticulous standards in supervision of lower court proceedings to assure that justice is fairly administered, Petitioners submit the record herein does not fall within the category of the cases above-cited. Rather, this is a case where a single set of test results embodied in a single document and introduced in the course of examination of an adversary expert is challenged years later on the basis of alleged after-discovered irregularities. This is not a case where the alleged tainted testimony was so contrived, so egregious or so pervasive in the record as to amount to a fraud on the adjudicatory agency.

Wholly apart from the test results evidenced by Schroter's Exhibit 14A, Petitioners established more than a *prima facie* case that the Doria deposits were of inferior quality. Witness Thwing, a consultant and former president of Triangle Rock products, concluded after his study which included results of tests in addition to those represented by Exhibit 14A, that the optimum use of the Doria deposits would be for low-grade fill material (Record, Adm. Hrg. 330, 345-46, 362, 380). Mr. Curtin of Owl Rock Products was of the opinion, even after taking samples and entering into a short-lived option with Doria, that the claims could not have supported a continuous commercial aggregate mine because the quality of material was poor and the relevant market adequately served by other producers (Record, Adm. Hrg. 457-458). At Doria's request Mr. Hove, operator of a concrete batch plant, also took samples from the claims and test results likewise indicated the material was substandard for commercial use (Record, Adm. Hrg. 482).

Further, as evidenced by the IBLA decision, Doria itself, notwithstanding its array of witnesses, failed to adduce convincing evidence to sustain its burden of proof that material on the claims was marketable at a profit either for sand and gravel or feldspathic sands. As stated under Point I, *supra,* proof of discovery of valuable minerals requires more than a showing of quality of the deposit involved. As appears from the IBLA decision, there was not a shred of evidence of any commercial demand for the sand and gravel deposits, or that material was removed from the claims for use in high grade concrete aggregate. Accordingly, as in *Humboldt Placer Mining Co. v. Sec'y of the Dept. of Interior, supra,* 549 F.2d 622, 625, the IBLA con-

cluded there was no positive evidence of marketability to overcome the contestants' *prima facie* case of invalidity [17 IBLA 380, 396]. The lack of sales of material from the Doria claims during the long years in which they lay dormant was certainly relevant to the issue of marketability. In the absence of a demand and marketability of the Doria deposits at a profit, the claims were properly declared null and void regardless of the results of tests run on samples. The importance of showing marketability at a profit in respect to mining claims was emphasized by this Court in the landmark decision of *United States v. Coleman,* 390 U.S. 599, 602 (1968), which approved the marketability requirement as a complement to the traditional "prudent man" test.

On the foregoing record, the Court of Appeals' reversal of summary judgment in favor of Petitioners and remand of the case to the district court was erroneous absent consideration of whether the alleged tainted testimony affected the decisions below or would have made any difference in result viewing the record as a whole. Resting its decision on a narrow jurisdictional ground, the Court of Appeals declined to consider this aspect of the case. Such disposition as was made herein, will encourage attacks on agency decisions in derogation of the limited scope of judicial review and will open the door to now proscribed *de novo* trials by the simple expedient of alleging fraud. Even under the narrow holding of the Court of Appeals, such expedient will involve examination of matters extrinsic to the record thereby giving the aggrieved party the equivalent of a *de novo* trial ostensibly to determine if the agency decision was "infected" with fraud. This result is wasteful, unnecessary and unfair in a case,

such as the one at bench, where ample evidence, independent of the alleged tainted testimony, exists to support the agency decision under settled principles of mining law.

Conclusion.

An aggrieved party's attack on an agency decision based on matters extrinsic to the administrative record, but intrinsic to the hearing, such as alleged perjured testimony, does not *ipso facto* require an inquiry into the merits of the charges. The Court should determine from a review of the entire record whether the alleged tainted evidence went to the core of the agency decision. If, as in the instant case, it did not and the decision is otherwise well supported by substantial evidence, continued litigation is needless and constitutes an unwarranted burden on the courts.

For the reasons set forth above a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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January 22, 1980.

Appendix "A".

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Doria Mining and Engineering Corporation, a corporation, Plaintiff-Appellant, vs. Rogers Morton, Secretary of the Interior, Calnev Pipeline Company a corporation, the State of California, Douglas Leisz, as Regional Director of United States Forest Service, and Harold Mitchell, as Acting Forest Supervisor of San Bernardino National Forest, Defendants-Appellees. No. 77-1163.

Appeal from the United States District Court For the Central District of California.

Filed: Nov. 2, 1979.

Before: TRASK and WALLACE, Circuit Judges, and SOLOMON,* District Judge.

WALLACE, Circuit Judge:

Doria Mining and Engineering Corporation (Doria) appeals from a summary judgment in which the district court affirmed an administrative decision by the Department of the Interior Board of Land Appeals (IBLA) regarding the validity of various placer mining claims. Among other things, Doria alleged that the IBLA decision was obtained by fraud and perjury, but the district court would not consider this allegation because it was based on evidence not found in the administrative record. We vacate the summary judgment and remand to the district court.

I

Doria has asserted a possessory interest in 18 placer claims (for the discovery of valuable sand and gravel deposits) which had been obtained from the United States

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*Honorable Gus J. Solomon, United States Circuit Judge, District of Oregon, sitting by designation.

Forest Service by Doria's predecessors in interest. The Forest Service granted to the State of California an easement across portions of land covered by Doria's purported claims, on which California subsequently built part of Interstate Highway 15. The Forest Service also granted special use permits to Calnev Pipeline Company (Calnev), which enabled it to construct a pipeline across land covered by Doria's claims. Both the easement and the permits were issued "subject to existing claims," but neither California nor Calnev sought permission from Doria before engaging in their construction projects. In 1970 and 1971, Doria filed actions against California and Calnev in California superior court alleging trespass and inverse condemnation.

In 1972, California and Calnev initiated private contest proceedings in the Department of the Interior pursuant to 43 C.F.R. § 4.450-1, claiming interests adverse to Doria's in the lands on which Doria's purported placer claims were located, and alleging that the claims were invalid for failure to discover a valuable mineral deposit within their limits. The United States subsequently intervened as a contestant on behalf of the Forest Service. Following a hearing, an administrative law judge ruled that the claims were invalid, and, on appeal, the IBLA affirmed.

Doria requested reconsideration of the IBLA judgment, based on "suspicions" that the contestants' primary expert witness, Schroter, had fraudulently altered mineral samples from Doria's claims, and had perjured himself in testifying about his sampling and testing methods. Upon denial of the request, Doria filed a complaint in district court pursuant to 28 U.S.C. § 1331(a) and portions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06,[1] for judicial review of

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[1]Subsequent to Doria's filing of its complaint, the Supreme Court held that jurisdiction to review administrative decisions by the Secretary of the Interior is conferred on the district court by section 1331, and not by the Administrative Procedure Act. *See Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978).

the IBLA judgment. Based upon the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, Doria also requested a judgment declaring that its placer claims were legal and valid. The complaint did not allege that Schroter had committed either fraud or perjury before the IBLA.

Doria claims that thirteen months after commencing its district court review action, it discovered in the collateral state proceedings what it believed was strong evidence of fraud and perjury by Schroter in the IBLA proceeding. Doria asserts that it immediately moved the district court for leave to amend its complaint to include allegations of such misconduct. The district judge took the motion under submission.

One month later, Doria renewed its motion for leave to amend and, in the alternative, moved for a stay of the district court proceedings pending an attempt to obtain a rehearing before the IBLA based on the purported new evidence. Both motions were denied, and the district judge subsequently granted summary judgment affirming the IBLA decision. Doria then moved for, and the district judge summarily denied, relief from judgment pursuant to Fed. R. Civ. P. Rule 60(b)(3).

Doria raises three issues on appeal: (1) whether the district court erred in denying, on jurisdictional grounds, Doria's motion for leave to amend its complaint or, in the alternative, for a stay of proceedings; (2) whether Doria's allegations of fraud and perjury raised factual issues that made the district court's subsequent granting of summary judgment improper; and (3) whether the district judge's summary denial of Doria's Rule 60(b)(3) motion constituted an abuse of discretion. We find it necessary to consider only the first issue.

II

The district courts have jurisdiction to review administrative decisions of the Secretary of the Interior pursuant to 28 U.S.C. § 1331(a). *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978). When the regulations governing an administrative decision-making body require that a party exhaust its administrative remedies prior to seeking judicial review, the party must do so before the administrative decision may be considered final and the district court may properly assume jurisdiction. *Eluska v. Andrus*, 587 F.2d 996, 999 (9th Cir. 1978); *Montgomery v. Rumsfeld*, 572 F.2d 250, 252-53 (9th Cir. 1978); *see* 5 U.S.C. § 704.

Department of Interior regulations do require that administrative remedies must be exhausted before any administrative decision from the Department is subject to judicial review. 43 C.F.R. § 4.21(b). Administrative remedies are deemed exhausted upon disposition of a claim which is not appealable to either the Director of the Interior Office of Hearings and Appeals or an Appeals Board such as the IBLA. *Id.* § 4.21(b). A decision of the IBLA is not subject to further appeal before either the Director or any Appeals Board. *Id.* § 4.21(c). When Doria lost before the IBLA, therefore, it had exhausted its administrative remedies, and the IBLA determination constituted the Secretary of the Interior's final decision to deny the validity of Doria's purported placer mining claims. The district court thus had jurisdiction to review the IBLA judgment.

III

The district court, however, denied Doria's motion for leave to amend, apparently on the ground that the court was without jurisdiction to consider evidence not found in the

administrative record.[2] It is true that the appropriate standard for review of administrative proceedings is whether the administrative findings are supported by substantial evidence in the record as a whole. *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91, 493, 497 (1951); 5 U.S.C. § 706. When, however, the party seeking review alleges that it has discovered new evidence showing that the decision before the court for review was obtained by a fraud on the administrative proceeding, we hold that the reviewing court may consider evidence extrinsic to the record in determining whether such allegations are meritorious.

Although no case was cited to us, and we have found no case which is direct authority for our conclusion, *Standard Oil Co. v. Montedison, S.P.A.*, 540 F.2d 611 (3d Cir. 1976), is instructive. In that case, the plaintiffs had filed, pursuant to 35 U.S.C. § 146, for district court review of a decision by the Board of Patent Interferences (Board). They later sought leave from the district court to amend their complaint to include allegations of fraud in the proceedings before the Board. Believing that it was not empowered to consider an issue that had not been raised before

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[2]The exact language of the district judge, in colloquy with counsel, was as follows:

> THE COURT: No, I think that I will take your matter to amend under submission . . ., but I just don't think I have jurisdiction. You are attacking the matter collaterally. You can't do it.
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> . . . .
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> THE COURT: If somebody has perjured himself, why don't you refer it to the United States Attorney?
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> . . . .
>
> THE COURT: To the criminal section.
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> . . . .
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> THE COURT: I will take it under submission but I just don't think I have any more right to interfere with — in this kind of a basis than I would have the right to interfere in a State Court trial proceeding.

The district judge ultimately denied Doria's motion without comment, and without giving Doria an opportunity to develop the motion's evidentiary foundation.

the Board, the district court denied the plaintiffs' motion to amend. *Id.* at 618. On appeal, the Third Circuit held that "in appropriate circumstances the district court may, in [a section 146] action, in the exercise of a sound discretion, permit an issue of fraud which infected the Board's determination to be raised though it was not raised in the interference proceeding." *Id.* at 617. The court enumerated a number of factors which the district court should consider when deciding whether to exercise discretion to hear new allegations of fraud,[3] and then stated: "If after considering all relevant factors the court concludes that manifest injustice to the parties and the public will otherwise result, it should permit the issue to be raised for the first time in the § 146 proceeding." *Id.*

Montedison's holding that a court reviewing an administrative determination may properly exercise its discretion to hear an issue of fraud not presented before the administrative body, and hence not found in the administrative record, finds some support in earlier cases. *See Interstate Investors, Inc. v. United States,* 287 F. Supp. 374, 382-84 (S.D.N.Y. 1968) (three-judge court) (court reached the merits of complaint seeking to set aside an adminstrative decision for fraud, based on evidence not contained in the administrative record), *aff'd,* 393 U.S. 479 (1969) (per curiam); *cf. United States v. Shotwell Mfg. Co.,* 355 U.S. 233, 240-45 (1957) (allegation that new evidence had been discovered showing fraud had been committed on the district court; Supreme Court considered such evidence in deciding that vacation and remand were required). *See also Linn and*

[3]These factors include: (1) whether there was "suppression, bad faith, or gross negligence on the part of the plaintiff in failing to raise the issue of fraud before the Board"; (2) whether evidence of the alleged fraud was "reasonably available" at the time the dispute was before the Board; and (3) whether the issue "has been or may be more conveniently and expeditiously raised in another" forum. 540 F.2d at 617.

Lane Timber Co. v. United States, 236 U.S. 574, 578-79 (1915) (a decision by the Secretary of Interior to issue land patents is open to reconsideration by the courts when the issuance has been obtained by fraud.[4]

Although the circumstances of *Montedison* are not identical to those of this case,[5] the rationale of that case—that in certain circumstances a court reviewing an administrative decision should hear new allegations of fraud based on evidence extrinsic to the record in order to prevent injustice—is equally applicable here. Newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record. If the reviewing court, in the face of an allegation that such evidence exists and that administrative remedies have been exhausted, nevertheless confines itself to consideration only of evidence in the record, the party seeking review is left without any forum in which to argue the allegedly fraudulent basis of the administrative judgment. This is precisely what hap-

[4]*But see Iron Ore Co. of Canada v. Dow Chem. Co.,* 177 U.S.P.Q. 34, 43-44 (D. Utah 1972) (district court indicated that, generally, it need not consider a newly raised issue in a section 146 proceeding), *aff'd on other grounds,* 500 F.2d 189 (10th Cir. 1974). *See also Standard Oil Co. v. Montedison S.p.A.,* 540 F.2d 611, 616 n.10 (3d Cir. 1976), (finding *Iron Ore Co.* unpersuasive authority on question whether new issue of fraud may be raised before reviewing court).

[5]An action taken in district court pursuant to 35 U.S.C. § 146 is procedurally a trial *de novo,* whereas judicial review of an IBLA judgment is not. The court in *Montedison,* however, observed that a section 146 review proceeding "is ordinarily subject to the general rule of estoppel applicable to proceedings for the review of administrative agency actions that consideration of issues ancillary to priority is limited to those issues which have been raised before the Board in the interference proceeding." *Standard Oil Co. v. Montedison S.p.A., supra,* 540 F.2d at 616 (footnote omitted). Insofar as allegations of fraud extrinsic to the administrative record are concerned, then, district court review of administrative proceedings, pursuant to section 146, is, as viewed by *Montedison,* indistinguishable from judicial review of IBLA proceedings.

pened to Doria.[6] We conclude that the importance of preventing the prejudice to Doria and similarly situated parties which arises out of circumstances such as those before us outweighs any countervailing interests which administrative agencies and other parties which appear before them may have in the finality of agency decisions. *Cf. Nasem v. Brown*, 595 F.2d 801, 806-07 (D.C. Cir. 1979) (consideration of applicability of collateral estoppel doctrine; court states that doctrine represents balance of needs of judicial finality and efficiency as against need for fairness and accuracy, and concludes that "[t]he advantages of finality . . . can only be fairly garnered when the party to be estopped has had an adequate opportunity to litigate his claims" *id.* at 806).

We thus hold that it was error for the district court to deny, for lack of jurisdiction, Doria's motion for leave to amend its complaint. Because we do not know how the district judge would have ruled on the motion had he believed he had jurisdiction, we vacate the summary judgment

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[6]During oral argument, the government contended that the proper forum for consideration of Doria's new evidence of alleged fraud and perjury was the Department of the Interior. The record, however, suggests that, as a matter of policy, the Department of the Interior refuses to grant requests for reconsideration of an administrative determination when the decision is before the district court for review. This was the Department's reason for denying Doria's first request for reconsideration, and the government itself stated during oral argument that it was also the basis for denying Doria's second request for reconsideration, made while this appeal was pending. In view of this apparent policy, it is at best questionable whether the proper forum for Doria to present its allegations of fraud rests in the Department of the Interior. In any case, this would not appear to implicate the jurisdiction of a reviewing district court to consider such evidence, because the Department does not require that a party's exhaustion of its administrative remedies prior to seeking judicial review include a request for reconsideration of the administrative decision. 43 C.F.R. § 4.21(c).

affirming the IBLA decision.[7] We remand to the district court for further proceedings consistent with this opinion, including consideration of the merits of Doria's motion.[8]

VACATED AND REMANDED.

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[7]It is thus unnecessary to decide whether the district court erred in granting summary judgment in the face of Doria's allegations of fraud and perjury.

[8]Because, in arguing the merits of its motion, Doria will have an opportunity to present to the district court its new evidence of alleged fraud and perjury, we also find it unnecessary to consider Doria's suggestion that the district court erred when it refused to consider the new evidence in connection with Doria's Rule 60(b)(3) motion.

APPENDIX "B".

Memorandum of Decision Granting Defendants' Motion for Summary Judgment.

United States District Court, Central District of California.

Doria Mining and Engineering Corporation, a Corporation, Plaintiff, v. Rogers Morton, Secretary of the Interior, Calnev Pipeline Company, etc., et al., Defendants. No. CV 75-899-FW.

Filed: Sept. 28, 1976.

In this action Plaintiff appeals from the decisi : of the Interior Board of Land Appeals (hereinafter the Board) declaring Plaintiff's placer mine claims invalid. Jurisdiction is based upon 5 U.S.C. §§701-706.

Plaintiff asserts a possessory interest in eighteen unpatented placer mining claims located within the San Bernardino National Forest.

On or about September 26, 1968, the United States Forest Service duly issued a highway easement to the State of California, and pursuant thereto, the State of California, without obtaining permission from the Plaintiff, constructed a portion of State Highway 15 across a portion of said claims.

In January, 1961, and March, 1970, the United States Forest Service duly issued Special Use Permits to Calnev Pipeline Company (hereinafter Calnev) and pursuant thereto, Calnev constructed pipelines across portions of the aforementioned mining claims without obtaining permission from Plaintiff.

The easement to the State and the Special Use Permits issued to Calnev were issued by the United States Forest Service subject to all existing valid claims on said United States Forest lands.

On or about December 30, 1970, Plaintiff filed suit in the Superior Court of San Bernardino County, California, Action No. 152480, against Calnev for trespass and inverse condemnation of said unpatented claims. On January 5, 1971, Plaintiff filed a second suit in Superior Court for San Bernardino County, California, Action No. 152504, against The People of the State of California for trespass and inverse condemnation because of the highway construction over and across a portion of said claims.

Thereafter in July, 1972, Calnev and the State of California initiated private contest No. R-4873 under 43 C.F.R. 4-450-1 et seq., in the United States Department of the Interior claiming an interest adverse to Plaintiff in said lands. The Contest Complaint charged that the eighteen purported placer mining claims of Plaintiff were invalid for lack of discovery of a valuable mineral deposit within the limits of any of the claims. In January, 1973, the United States of America intervened in behalf of the United States Forest Service. Following a hearing in the United States Department of the Interior, Office of Hearings & Appeals, Hearings Division, the Administrative Law Judge declared each and all of said claims null and void. The contestees took a timely appeal to the Interior Board of Land Appeals which declared all eighteen claims null and void. Plaintiff is now appealing the decision of the Interior Board of Land Appeals.

An appeal from a decision of the Interior Board of Land Appeals does not entitle the Plaintiff to a trial de novo on the facts, but rather only to a determination that the Board's decision is supported by substantial evidence considering the record as a whole. *Multiple Use, Inc. v. Morton,* 504 F.2d 448 (9th Cir. 1974).

In examining the record before the Court, the evidence shows that the tests conducted by the government's expert,

Mr. Austin Schroter, demonstrated the invalidity of the claims under either the marketability or the "prudent-man" man test. *United States v. Coleman,* 390 U.S. 599 (1968).

The tests showed there were no valuable mineral deposits in the area of Plaintiff's claims and that the sand and gravel present in the area did not satisfy specifications required for commercial aggregate, or common variety minerals, as of July 23, 1955, the date of the Surface Use Act which withdrew common variety minerals from location under the mining laws. 30 U.S.C. §611. Plaintiff is therefore limited to discoveries of noncommon or valuable minerals.

It appears that once the highway easement grant and Special Use Permits were made, they had the effect of withdrawing the areas covered thereby from mineral entries to the extent necessary for the Interstate highway and the pipeline, and precluded mineral entries incompatible therewith. See 1 *American Law of Mining* §2.85.

A mining claimant on withdrawn land must show discovery of a valuable mineral deposit before the withdrawal, since the right to prospect for minerals ceases on the date of withdrawal. *United States v. Pulliam,* 1 IBLA 143 (1970); see *Lockhart v. Johnson,* 181 U.S. 516, 520 (1901).

The mining claims involved herein remained open to subsequent valuable mineral location subject however to the grants of right of way and the Special Use Permits to the State of California and Calnev.

With regard to Plaintiff's discovery of noncommon variety minerals, it appears from the testimony of Plaintiff's own witnesses that its examination and testing of materials for feldspathic sand (which the Board assumed to be noncommon variety) was preliminary and exploratory suggesting prospecting and not development which is required to meet the "prudent-man" test. *Barton v. Morton,* 498 F.2d 288 (9th Cir. 1974).

A valid claim requires more of an evidentiary showing than finding that further exploration might be warranted. *Multiple Use, Inc. v. Morton, supra.*

"If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction." *United States v. Zeweifel,* 508 F.2d 1150, 1156 (10th Cir. 1975).

Plaintiff also alleges procedural errors which it claims resulted in a denial of due process. The alleged errors involve the government's intervention in the proceeding initiated by the State of California and Calnev.

Plaintiff contends that 43 C.F.R. §4.451-1 only permits the United States to initiate proceedings, not to intervene in pending proceedings. While there is no case on point regarding intervention of the United States, intervention by the Bureau of Land Management seems clearly contemplated. It is provided in 43 C.F.R. §4.452-5 that "the contestant will then present his case following which the other parties (and in private contests the Bureau, if it intervenes) will present their cases." It appears by analogy that the United States should have the authority to intervene herein.

Plaintiff also alleges that the notice it received was insufficient under 43 C.F.R. §4.451-1. However, the Court finds the notice was sufficient to apprise Plaintiff that the United States was adopting the private contestants' claims.

Plaintiff asserts that the intervention of the United States shifted the burden of proof to the Plaintiff, and that this was improper. It should be noted, however, that in the decision of Administrative Law Judge Holt there is no ruling on the burden of proof. Moreover, the Board in its review of Judge Holt's decision stated that "regardless of which party the

Judge placed the burden of proof upon, the evidence presented by the private contestants clearly established the invalidity of the subject mining claims.'' 17 IBLA 389.

Plaintiff's last claim of procedural error, that it should have been notified prior to the hearing that the burden of proof had shifted, also appears to be without merit in view of the number of witnesses it introduced. Plaintiff seemed fully prepared to assume the burden of proof.

Based on the foregoing, the Court finds that Plaintiff had a full hearing and an ample opportunity to present evidence, and that there was no denial of due process. Furthermore, it appears that the decision of the Board was supported by substantial evidence.

The foregoing constitutes the summary of undisputed material facts and conclusions of law of the Court. No judgment shall be entered until the Court has signed its formal judgment.

DATED this 28 day of September, 1976.

/s/ Francis C. Whelan
FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE.

APPENDIX "C".

United States Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203.

State of California, et al. v. Doria Mining and Engineering Corporation, et al., United States, Intervenor. IBLA 74-192.

Decided: October 31, 1974.

Appeal from decision of Administrative Law Judge Graydon E. Holt (California Contest No. R-4873) declaring mining claims null and void.

Affirmed.

APPEARANCES: Joseph A. Montoya, Esq., Robert L. Meyer, Esq., Hugh R. Williams, Esq., and Robert W. Vidor, Esq., Legal Division, Department of Public Works, Los Angeles,[1] for appellee State of California; David G. Moore, Esq., Reid, Babbage & Coil, Riverside, California, for appellee Calnev Pipe Line Company; Milnor E. Gleaves, Esq., Los Angeles, California, for the appellants; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California, for the United States, Intervenor.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Doria Mining and Engineering Corporation, Richard H. Hutchinson, J. J. Schwietert and E. May Schwietert have appealed from a decision by Administrative Law Judge Graydon E. Holt, dated December 26, 1973, declaring ap-

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[1]On June 25, 1973, the parties were given notice that pursuant to CAL. GOV'T CODE §14008, the Department of Transportation succeeded to all the duties, powers, purposes, responsibilities and jurisdiction of the Department of Public Works, State of California, effective July 1, 1973, and effective that date assumed the position of said Department of Public Works as contestant in these proceedings. Counsel of record remained the same.

pellants' eighteen 40-acre association placer mining claims null and void.

Appellants' mining claims were located between March 1, 1953, and July 22, 1955.[2] The claims are situated in Cajon Pass approximately halfway between Victorville and San Bernardino, and lie within the San Bernardino National Forest in secs. 14 and 23, T. 3 N., R. 6 W., S.B.M., California.

Appellee State of California claims an interest in sections 14 and 23 by virtue of a Highway Easement Deed issued by the United States on September 26, 1968.[3] Between 1968 and 1970, the State entered upon portions of sections 14 and 23 and constructed a highway commonly known as Interstate 15. This highway crosses over some of appellants' mining claims. The State's easement is subject to:

> (1) Outstanding valid claims, if any, existing on the date of this grant, and the Grantee shall obtain such permission as may be necessary on account of any such claims. [Ex. 1]

Appellee Calnev Pipe Line Company is a corporation engaged in the construction, maintenance and operation of pipeline systems for the purpose of transporting liquids. On January 1, 1961, and March 27, 1970, the United States Department of Agriculture, Forest Service, issued Special Use Permits to Calnev for the construction of pipelines across portions of sections 14 and 23. In 1961, Calnev entered upon these sections and constructed a high pressure pipeline. In 1970, Calnev again entered the area and constructed another high pressure pipeline. The pipelines cross

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[2]See Appendix A.

[3]The right-of-way was granted by the Department of Transportation under the authority of the Federal Aid Highway Act of August 27, 1958, *as amended*, 23 U.S.C. §107(d) (1970). The Department of Agriculture, acting by and through the Forest Service, agreed to the transfer of the easement through the San Bernardino National Forest.

over portions of appellants' mining claims. Calnev's permits were "subject to all valid claims" (Exs. 2a, 2b).

On December 30, 1970, and January 5, 1971, appellants filed in the Superior Court of San Bernardino County complaints in inverse condemnation and trespass against Calnev and the State of California. In their complaints appellants alleged: (a) ownership of the 18 unpatented placer mining claims; (b) that Calnev and the State, in construction of the above-mentioned improvements, entered upon and took permanent possession of portions of land covered by the mining claims without permission and authority of appellants; (c) that the lands embraced within said mining claims contain valuable deposits of sand, gravel and precious metals; (d) that by reason of the construction and maintenance of the improvements, extraction of sand, gravel and precious metals within the area of the Easement Deed and Special Use Permits has been rendered impossible; and (e) extraction of minerals has been rendered practically and economically unfeasible upon remaining portions of the mining claims. Appellants prayed for damages against Calnev and the State in excess of $15,000,000.

On July 20, 1972, appellees initiated a private contest against appellants pursuant to 43 CFR 4.450. Appellees claimed that by virtue of the easement and permits noted above they were competing users, and claimed an interest adverse to appellants' interests in the lands embraced within the mining claims. Their complaint maintained that appellants' mining claims were invalid for the following reasons:

> (a) There is not disclosed within the boundaries of said mining claims, and each of them, mineral materials of a variety subject to the mining laws sufficient in quantity, quality and value to constitute a discovery;
>
> (b) The materials found within said mining claims, and each of them, could not have been mined, removed

and marketed at a profit prior to the Act of July 23, 1955; and

(c) The land embraced within said mining claims, and each of them, is non-mineral in character.

Appellants filed an answer to the complaint stating that the 18 placer mining claims were valid. Appellants also filed a motion to dismiss the contest alleging that the contestants lacked standing to bring the action under the private contest provision cited above because neither the easement nor the permits created an interest "adverse" to the interests of the contestees. Judge Holt denied appellants' motion to dismiss.

On January 15, 1973, Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, filed a notice of appearance on behalf of the United States requesting the right to intervene in the capacity of a contestant. The request was based on the Forest Service's determination that the proceedings directly concerned the status of land comprising a portion of the San Bernardino National Forest. Judge Holt granted the motion for intervention. Appellants' motion to set aside the order allowing intervention by the United States was denied. Thereafter, a hearing was held in Los Angeles, California, beginning on April 26, 1973.

The issues at the hearing narrowed to the questions of (a) whether there was a discovery of a valuable sand and gravel deposit on each claim as of July 23, 1955, and without substantial interruption up to the time of the hearing, and (b) whether there was a discovery of a valuable deposit of feldspathic sand usable for glass manufacturing as of the

time of the hearing.[4] Based on the evidence presented at the hearing, the Administrative Law Judge found that such discoveries did not exist and concluded that all 18 placer mining claims were therefore invalid. Accordingly, he declared them null and void.

On appeal, appellants press the following arguments:

1) The contestants have no property interest adverse to the contestees', which adverse interest is a prerequisite to *standing* to initiate a private contest; the contestants only have a license from the United States to cross national forest land, subject to existing rights. Also, by way of preface, appellants reassert their objection to the entry by the United States as intervenor in these proceedings.

2) The rights of the contestees in each claim are private property rights of which they may not constitutionally be deprived by other private parties in an administrative proceeding.

3) The Administrative Law Judge erroneously assumed that the contestees in a private contest have the burden of proving the validity of their claims.

4) The contestants failed to establish by a preponderance of the evidence that the claims are invalid.

5) The Administrative Law Judge improperly denied the contestees' motion to reopen the hearing for the receipt of further evidence.

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[4]The Judge did not make any determination regarding the charge that the land was nonmineral in character. In his decision, at 2, he had the following to say:

> If there has been a discovery of a valuable mineral deposit, the land must necessarily be mineral in character. If there has not been such a discovery on a claim, the claim is void. Although each 10-acre subdivision must be mineral in character, the determination in this case will be based on the question of discovery not on the mineral character of the land. Accordingly, the third charge is dismissed.

In their initial argument on appeal, appellants maintain that the contestants' easement and special use permits are not interests "adverse" to the interests of appellants within the meaning of 43 CFR 4.450-1. Accordingly, they argue that the contestants lack standing to initiate a private contest. We do not agree. 43 CFR 4.450-1 reads as follows:

> *By whom private contest may be initiated.* Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

In *Duguid v. Best,* 291 F.2d 235 (9th Cir. 1961), *cert. denied,* 372 U.S. 906 (1963), the Court of Appeals held that pursuant to the above regulation[5] the holder of a special use permit granted by the Forest Service, Department of Agriculture, which permitted construction of a dam and spillway on national forest land, could initiate a private contest to determine the validity of a mining claim in conflict with the special use permit.[6] The facts in that case are

[5]With minor variation, the regulation was at that time codified at 43 CFR 221.51.

[6]*See also Thomas v. DeVilbiss,* 10 IBLA 56, 57 (1973), holding that the owner of a grazing lease under section 15 of the Taylor Grazing Act of 1934, *as amended,* 43 U.S.C. § 315 (1970), had a sufficient adverse interest under 43 CFR 4.450-1 to initiate a contest against a mining claimant alleging lack of discovery of valuable minerals; and *Sedgwick v. Callahan,* 9 IBLA 216, 223 (1973), holding that surface patentees under the Stock-Raising Homestead Act of 1916, *as amended,* 43 U.S.C. § 291 *et seq.* (1970), had an adverse interest sufficient to bring a private contest against mining claimants. *See also United States v. Howard,* 15 IBLA 139 (1974); *City of Phoenix v. Reeves,* 14 IBLA 315, 81 I.D. 65 (1974).

strikingly similar to the situation presented in this proceeding. In *Duguid,* the Paradise Irrigation District was granted a permit "subject to all valid claims." Subsequent to the grant of the permit, the District, without the consent of the mining claimants, took posession of a portion of the mining claim and proceeded to construct a dam and spillway thereon. The claimants then instituted an action against the District in the Superior Court of the State of California alleging unlawful taking of private property. Thereafter the District filed in the California Land Office, Bureau of Land Management, a complaint against the mining claimants as a private contest seeking an adjudication by the Bureau of the validity of the mining claim. The District's complaint alleged that its special use permit entitled it to use the lands specified in its permit, that the mining claimants were asserting an adverse claim, and that the lands within the mining claim were nonmineral in character and contained minerals insufficient to constitute a discovery. The Court of Appeals held that under such circumstances the initiation of a private contest by the District was proper.

[1] A similar conflict of interest exists in the present proceeding. To the extent that a multi-lane, major freeway and high-pressure pipelines cannot co-exist with the mining of sand and gravel and other minerals on the subject claims, the interests of the State and Calnev are clearly "adverse" to the interests of the appellants within the meaning of 43 CFR 4.450-1.[7] Appellees are entitled to bring an action in

[7]The record indicates that in 1960 appellant J. J. Schwietert, then owner of all 18 claims, executed a waiver of rights to surface use thereof (Exs. C, D, E) under the provisions of section 6 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 614 (1970). By such voluntary relinquishment, Mr. Schwietert gave the United States the right to manage and dispose of the vegetative surface resources on the claims and to manage other surface resources thereof. But as correctly pointed out by appellants, section 4 of the Act, 30 U.S.C. § 612 (1970), provides that,

(footnote continued on following page)

the Department to determine whether discoveries have been perfected on appellants' unpatented mining claims so that appellees may know the proper course to follow in protecting their interests in the land. Accordingly, we conclude that the appellees have standing to bring this private contest.

[2] Appellants further object to the United States Department of Agriculture intervening in the contest in the capacity of a contestant. Intervention was clearly proper as the Department of Agriculture was a party whose interests were affected by the proceeding. *See United States v. McCall,* 2 IBLA 64, 75, 78 I.D. 71 (1971). When lands within national forests are not valuable for their mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands in order to properly administer them as the law directs. Accordingly, if the Department of Agriculture determines that it has an administrative need to ascertain its right to certain lands upon which mining claims are located, then it is entitled to have that right adjudicated, and that duty devolves upon this Department. *United States v. Bergdal,* 74 I.D. 245, 252 (1967); *H. H. Yard,* 38 L.D. 59, 66-67 (1909). The purpose of this private contest was to ascertain the validisty of mining claims lying in a national forest. The initiation of such a proceeding could have been recommended by the Forest Service pursuant to the Memorandum of Understanding executed by the Bureau of Land Management and the

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any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *.

Section 6 further provides that,

no such waiver or relinquishment shall be deemed in any manner to constitute any concession as to the date of priority of rights under said mining claim or as to the validity thereof.

Thus, the relinquishment of surface use under this Act has not removed the conflict between the parties.

Forest Service, effective May 3, 1957. VI BLM Manual 3.1 (June 21, 1962). Had such a separate proceeding been brought, it could have been consolidated with the private contest. *Marvel Mining Co. v. Sinclair Oil and Gas Co., United States v. Marvel Mining Co.,* 75 I.D. 407, 410 (1968). Whether done by consolidated proceedings or by intervention, the substance of the action is the same. Furthermore, the Government intervenor may attack the validity of the mining claims on the grounds disclosed by the private contestants' complaint. *Jebson v. Spencer,* 61 I.D. 157, 169 (1953). It was also proper for the Government to be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service. *United States v. Ramsher Mining and Engineering Co.,* 14 IBLA 32, 36 (1973). *See also* 43 CFR 1862.4.

[3] Appellants' second allegation of error is also without merit. If an unpatented mining claim is invalid, compensation is not required because "no right arises from an invalid claim of any kind," and thus nothing is taken from the claimant. *Cameron v. United States,* 252 U.S. 450, 459-60 (1920). This is true whether the determination of invalidity is made in a proceeding initiated by the Government or by a private party. In either case the adjudication is made not by the party who initiates the proceedings, but by authorized representatives of the Department of the Interior. *See Duguid v. Best, supra* at 241. It has been argued before that such validity proceedings are unconstitutional administrative takings or condemnations of private property. The courts, however, have recognized that the Department of the Interior has plenary power in the administration of public lands, and as part of that power the Department has the authority, after proper notice and upon adequate hearing, to determine the validity of unpatented mining claims. *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334 (1963);

Cameron v. United States, supra; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), *cert. denied,* 393 U.S. 1025 (1969); *Davis v. Nelson,* 329 F.2d 840 (9th Cir. 1964). *See also United States v. Howard,* 15 IBLA 139, 143 (1974); *United States v. Northwest Mine & Milling, Inc.,* 11 IBLA 271, 272-73 (1973); *United States v. Dummar,* 9 IBLA 308, 309 (1973).

In their third and fourth arguments, appellants generally maintain that the Administrative Law Judge's decision was incorrect as it was based on the improper assumption that the contestees had the burden of proving the validity of their claims. Appellants argue that the contestants were required and failed to prove by a preponderance of the evidence that the claims were invalid.

We note that while in a private contest the party bringing the action generally has the burden of preponderating on the disputed issue, *Marvel Mining Co. v. Sinclair Oil and Gas Co., supra* at 423, when the Government intervenes as a contestant the proceeding then becomes analogous to any other government contest where we have held that the contestant need only show a prima facie case of invalidity. The burden then shifts to the mining claimant to show by a preponderance of the evidence that the claims are valid. *United States v. Clear Gravel Enterprises, Inc.,* 2 IBLA 285, 301 (1971); *see Foster v. Seaton,* 271 F.3d 836, 838 (D.C. Cir. 1959).

In any case, the issue is without consequence because regardless of which party the Judge placed the burden of proof upon, the evidence presented by the private contestants clearly established the invalidity of the subject mining claims. The thrust of contestants' evidence wholly negated the existence of a discovery on any of the claims. Thus, we find that the Judge's conclusion that the claims are invalid is supported by a preponderance of the evidence in the

record. As the appellants essentially contend that the Judge's decision is contrary to the evidence, we shall set forth the salient points adduced at the hearing.

The contestants' first witness was Austin Schroter, a consulting geologist and mining engineer with 35 years of experience in various positions in the mining industry (Tr. 76). Mr. Schroter made a mineral evaluation study of the claims to see if there were valuable minerals of any kind. During his examination he was aided by Dr. Robin Willis, an engineering and petroleum geologist, T. A. DeVore, a metallurgical engineer, Charles A. Lee, a geologist, John F. Schroter, an engineering technician, and Frank Nevin, an engineering geologist (Tr. 98).

In the spring of 1972, Schroter and his aides undertook a sampling program on each of the claims (Tr. 124-25). Samples were taken from each claim at an average depth of 10 to 12 feet. Each sample was then coned, quartered down and split into four sections. One quarter was screened and weighed on the ground to determine the sand to gravel ratio, a second quarter was submitted for laboratory analysis, the third quarter was retained for examination for precious metal content, and the last quarter was reserved for examination by interested parties, such as the contestees (Tr. 127).

In a laboratory analysis, Schroter tested the samples from the claims to determine their sand to gravel ratios, their resistance to abrasion (L. A. Rattler Test), and their sand and silt content (Sand Equivalent Test) (Tr. 135-36). The test results indicated that the material on the claims did not meet minimum specifications required for commercial aggregate in the industry as of July 23, 1955, or for any period thereafter (Tr. 135, 142, 147, Ex. 14a).

In addition to the sand and gravel study, the claims were examined for precious metals. Samples from each of the

claims were panned to a concentrate and no gold or silver was observed in particulate form (Tr. 147-48). The samples were also subjected to fire assay (Exs. 15a, 15b, 15c) and again the quantity of gold and silver did not approach commercial significance on any of the claims (Tr. 153, 264). Assays for precious metals were performed both by Mr. DeVore and by the Union Assay Office of Salt Lake City, Utah (Tr. 151, Exs. 14b, 14c, 14d). No metals of any value were found. Schroter testified that the claims were examined for any type of commercial mineral whatsoever: oil, gas, gold, silver, platinum, industrial minerals, feldspar, orlithium, zirconium, vanadium, etc., "any commercial mineral whatever, we looked for," (Tr. 222), but nothing of commercial value was discovered.

In addition to the mineral examination, Schroter did an extensive sand and gravel marketing study. He determined that the relevant trade territory extended to San Bernardino, 20 miles to the south, and Victorville, 20 miles to the north (Tr. 200-01). Schroter interviewed sand and gravel producers who were supplying this area and acquired information regarding the quality and quantity of the materials they produced both at the present time and at the time that common varieties of sand and gravel were withdrawn from location. He also received information regarding haulage rates, market prices, costs of production and the extent of demand for sand and gravel in the trade territory (Tr. 205-07).

Schroter determined from his investigation that except for State highway projects underway during 1953-55 and 1968-70, there were no major public projects under construction requiring significant amounts of aggregate within a reasonable distance from the subject claims (Tr. 221). During the periods of limited demand when no State highway construction occurred, local producers in San Bernardino and Victorville were supplying high quality sand and gravel for use in residential construction, streets and highways, manufacture of sewer pipe, manufacture of ready-mix concrete, and manufacture of transit mix concrete (Tr. 221).

The evidence presented at the hearing was inconclusive regarding whether material from the subject claims was suitable for use in the construction of the State highways. Schroter testified that he examined State highway records which indicated that the material in sections 14 and 23 was unsuitable for use as mineral aggregates for road construction (Tr. 161). The State records indicate that land outside of the area of the claims, in sections 13 and 23, was used as a borrow pit for embankment material and for other low-grade material requirements (Tr. 196-97). The appellants argued that the material on the claims was suitable for highway construction as the State had waived its specification requirements when marginal quality material was in close proximity to the highway project (Tr. 1223).

In summary, Schroter determined that the sand to gravel ratio on the claims was not in proper balance and was below minimum standards for commercial grade aggregate, the claims were at a mileage disadvantage compared to established commercial producers both in San Bernardino and Victorville, there was no proven use or production record for the materials on the claims, the established producers were adequately supplying the needs of the relevant market area with better quality material, and no other valuable minerals existed on the claims which could be produced at a profit (Tr. 224-26). Based on an analysis of the foregoing factors, Schroter concluded that the deposits on the subject claims as of July 23, 1955, and up until the time of the hearing, could not have been mined, processed, removed and sold at a profit in a sand and gravel operation alone,

or in a sand and gravel operation combined with production of a valuable mineral byproduct (Tr. 225, 226, 231, 1267).

Contestants' second witness was George Thwing, Mr. M. Thwing received a degree in civil engineering in 1928, and worked in the mining industry until 1938 when he went into the sand and gravel business. He operated the Triangle Rock and Gravel Company in San Bernardino, which produced sand and gravel and ready-mix material (Tr. 324-25). In 1973 he retired from the company and is currently operating as a business consultant. He was retained by the contestants to make a study of and form an opinion on the probability of developing a profitable sand and gravel operation from the lands covered by the subject claims as of July 23, 1955 (Tr. 328). He examined Schroter's test results, investigated the quality of and supply and demand for sand and gravel in the market area, haulage rates, availability of water for processing, specifications for commercial aggregate, quality and quantity of material on the claims, and concluded that it would not have been feasible to put a commercial plant on the site and operate in the market that was existing in 1955, or thereafter (Tr. 330, 345-46, 362). He determined that the only possible use for the material on the claims would be for low-grade fill material (Tr. 380).

Contestants' final two witnesses were Edward J. Curtin and Robert E. Hove. Mr. Curtin has been in the sand and gravel business for 18 years and is presently employed as manager of technical services for Owl Rock Products Company. Prior to this job he was employed by Owl Service Rock Company in San Bernardino (Tr. 441-42). Curtin testified that contestee Richard Hutchinson approached Owl Service Rock Company in 1967 with an offer to use the sand and gravel on the subject claims for construction of aggregates to be used in connection with the upcoming bids for the Interstate 15 highway project (Tr. 445). Owl sampled

the area and then entered into an option agreement which for $1,000 granted the right to remove 500,000 tons of material at a rate of 9¢ per ton for the first 100,000 tons, and 8¢ per ton thereafter (Tr. 450). Owl solicited all the general contractors who were bidding on the job but was unsuccessful in securing a contract. Curtin testified that Owl was not interested in the material for anything other than the highway project, and thus chose not to exercise the option (Tr. 457). He also expressed the view that based on his experience in the industry, a commercial aggregate operation could not have been installed within the area of the subject claims as the quality of the material was poor and the market was adequately covered by other producers (Tr. 457-58).

Mr. Hove is the owner-operator of a ready-mix concrete and aggregate plant, Hi-Grade Materials Company, in Lucerne, California. He has been in operation since 1955 and Victorville is part of his marketing area (Tr. 472-73). He testified that in 1969 he was approached by contestee Hutchinson regarding development of aggregates on the subject claims. He sampled the area and had the samples sent to the CHJ Materials Laboratory, Inc., San Bernardino, for testing (Tr. 478). The test results indicated that the quality of the material was too poor for commercial production, and accordingly no agreement was executed (Tr. 482, Ex. 25).

For the appellants, both contestee Hutchinson and J. J. Schwietert testified that in their opinion the subject claims could be commercially exploited (Tr. 556-76, 1180-88). Schwietert testified that for a period of ten years he had been stockpiling material from the claims for the purpose of seeing what materials were on the claims and to sell such material if he could find a willing buyer (Tr. 570-72). He never analyzed the quality of the material nor did he sell

any of it, but he stated that he gave it away to friends for use as foundation material (Tr. 576). James Maxwell Muir, Jr., President of King Solomon Mining Corp., and a stockholder in Doria Mining and Engineering Corp., testified that in his opinion it would have been commercially feasible in 1955 to install a $1,200,000 mill producing 600 tons per day of aggregate material (Tr. 1061-65). He offered no market or cost analyses to justify why such a project would have been commercially feasible.

Shortly before the hearing, the Hazen Research Company, Golden, Colorado, a mining exploration and consulting organization, was retained by the contestees to investigate the claims to determine what minerals could be produced. The conclusion of the Hazen Report (Ex. B) is that sand and gravel on the claims can be used in aggregates and that feldspathic sand in the fines can be used in the manufacturing of glass. The Hazen Report was prepared by William T. Hamling, David D. Billings, and Ralph Paul Meyertons.

Hamling is a mining engineer employed by the Hazen Company. His assignment was simply to take samples from the claims; he did not analyze the material nor did he make any investigation as to its marketability (Tr. 540-41). From two of the claims, the Outlook and Old Sunny, Hamling removed large, 120-gallon samples of material. From the remaining 16 claims he took smaller, 5-gallon samples; in some instances these latter samples represented 3-foot deep streambed excavations. Hamling testified that the time allotted for sampling was not sufficient to allow drilling a hole on each claim, but he was of the opinion that such drilling was unnecessary as the material in the general area did not appear to vary greatly from one claim to the next (Tr. 530-31).

Billings is a self-employed glass technologist who was called in to work with the Hazen Company to determine if suitable feldspathic sand products could be extracted for use in the glass industry (Tr. 612-20). He examined {]1/4]} pound of material from the large samples (Tr. 760). Based on his examination, he was of the opinion that given a 60% recovery rate from the bank-run material, it would be feasible to produce feldspathic sands for use in the Los Angeles glass industry (Tr. 631-33).

On cross-examination, Billings' opinion as to the commercial feasibility of producing feldspathic sands became fraught with qualifications and contingencies. He noted that he had made no estimate of the cost of setting up a plant (Tr. 652), he had not considered the cost of stripping overburden (Tr. 795), nor the costs of disposing of waste (Tr. 794). He assumed an ample water supply (Tr. 655), and also assumed that the quality of the material did not differ at different depths (Tr. 767). He did not know whether there were ample reserves on the claims (Tr. 647).

He made two very significant qualifications for the purposes of this decision. First, he did not analyze any of the 16 small samples and thus could only speculate and draw inferences as to the feldspathic sand quality on 16 of the claims. In these instances he recommended further sampling and testing to determine the quantity and quality of feldspathic material (Tr. 775). On cross-examination he was asked:

> Q. Sir, as a glass technologist, would you consider a mere visual inspection of samples from a potential site sufficient to advise a client whether or not the material would be acceptable as a glass sands component in a glass batch operation?
>
> A. No.

(Tr. 696).

Second, he noted that the relevant glass sand market was being supplied by an operation at Mission Viejo near Capistrano and by an operation at Del Monte, California. The Mission Viejo mine, which at the time of the hearing was shut down for an indefinite period, served approximately 75% of the market (Tr. 803), and had estimated reserves for a 50-year period (Tr. 647). Billings testified that given the market situation, a successful glass sands operation was contingent upon getting long-term commitments from potential customers (Tr. 776). He recommended that before investing any money in such an operation, it would be advisable to determine when the Mission Viejo mine was going back into production (Tr. 637), and to have potential customers examine the material on the subject claims to see if it fit their particular needs (Tr. 630, 780). Neither the appellants nor the Hazen Company contacted any producers or users of feldspathic sand to determine whether the products from the subject claims could be marketed. Billings testified that a plant capable of processing 100 tons per day would have cost $250,000 to $350,000 in 1955 (Tr. 662). James Maxwell Muir, Jr. placed the cost of a plant at $2,000 per ton in 1955 and $3,000 per ton in 1973, or $1,200,000 and $1,800,000, respectively, for a 600 ton per day plant (Tr. 1061, 1064). Schroter testified that a 100 ton per day plant producing both sand and gravel and feldspathic sand would cost $850,000 (Tr. 1284).

Meyertons is a mining and metallurgical engineer employed by the Hazen Company (Tr. 816). Meyertons testified that he visually examined the 16 small samples and was satisfied that the mineral content would be reasonably the same from sample to sample (Tr. 846). He did note, however, that had there been more time he would have further analyzed the 16 small samples (Tr. 859). Following an initial analysis of the two larger samples, Meyertons

decided to abandon the search for gold, silver and other precious metals (Tr. 882), and limit the examination to feldspar products (Tr. 883). Meyertons sent a portion of the large samples to Pacific Materials Laboratory, Inc., Bloomington, California, for an evaluation of the suitability of the material for use as an aggregate (Tr. 829). The test results indicated that the material was of poor quality (Ex. 27).

Meyertons testified that the Hazen Report showed that the feldspathic sand found in the samples tested was of sufficient quality to be used in the glass industry. He noted, however, that the potential inaccuracy in the total feldspar determination could be as much as 20% on the samples tested (Tr. 938), and that additional variances could occur with respect to the 16 untested samples. Accordingly, he recommended additional sampling and testing of the materials on the claims (Tr. 859, 945-46). A flow sheet was developed to show in a preliminary fashion how products could be produced in a sand and gravel and glass sand operation (Tr. 836). The report was in essence a technical feasibility study, not a marketability study.

Appellants' last witness was J. Mark Longfield. Mr. Longfield is a consultant for construction aggregate businesses and has been involved in the sand and gravel industry since 1964 (Tr. 1219). His opinion was limited to the marketability of sand and gravel only. Longfield viewed the claims and in his opinion the material thereon was "marginal" (Tr. 1222). After studying the relevant market he testified that aside from the highway projects, very little demand existed in the Victorville area until 1965, and while there was some activity in the Hesperia-Apple Valley area, this was adequately covered by local producers (Tr. 1238). He also testified that appellants could not compete in the San Bernardino area because the rock being supplied there was of superior quality. Based on these factors he concluded

that a sand and gravel operation could not have been profitable either in 1955 or at any time up to the hearing (Tr. 1241). He did testify, however, that an operation might be successful if a co-product was produced in conjunction with sand and gravel (Tr. 1241). He was not an expert, however, with regard to the production of feldspathic sand and stated that he had no opinion as to whether in 1955 a sand and gravel and feldspathic sand operation could have produced and sold material at a profit (Tr. 1251).

The basic principles of law applicable to this case are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *

Castle v. Womble, 19 L.D. 455, 457 (1894); *United States v. Coleman,* 390 U.S. 599 (1968). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. *United States v. Coleman, supra.* This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims. *Palmer v. Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied,* 393 U.S. 1066 (1969); *Foster v. Seaton, supra.*

[4] The parties to this proceeding stipulated that the sand and gravel on the claims was to be treated as a common

variety material located prior to the withdrawal of such materials (Tr. 144-45). Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. §611 (1970), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. *United States v. Barrows,* 404 F.2d 749 (9th Cir. 1968), *cert. denied,* 394 U.S. 974 (1969); *Palmer v. Dredge Corp., supra; United States v. Clear Gravel Enterprises, Inc., supra.* This entails a showing of the market which then existed, the cost of extraction and processing which would have been incurred, the transportation charges which would have been involved, the unit price which then prevailed and the profit which the claimants might have realized if they had elected to proceed at that time. *United States v. Gibbs,* 13 IBLA 382, 391 (1973).

The evidence presented at the hearing clearly established that the sand and gravel on the subject claims was of inferior quality and was not acceptable for the type of work being done in the relevant market from the period 1955 to the hearing. During that period deposits of superior quality were being actively exploited in the area and there was only a limited local demand for sand and gravel. Under such circumstances, no discovery of sand and gravel existed on appellants' claims. *Barrows v. Hickel,* 447 F.2d 80, 83 (9th Cir. 1971). It is of no consequence that appellant Hutchinson gave material from the claims to his friends at no cost. It has been held that the disposal of substantial quantities of sand and gravel at no profit does not demonstrate the existence of a market for the material which would induce a

man of ordinary prudence to expend his means in an attempt to develop a mine on his claims. *Barrows v. Hickel, supra.*

The above finding disposes of the contestees' assertion that the Calnev and State rights-of-way are in derogation of their mining claims. The rights-of-way were granted in 1961, 1968 and 1970. Since the mining claims during those periods (and beyond) were at most valuable only for sand and gravel, the finding that the claims were invalid as sand and gravel claims as of the dates when the rights-of-way issued requires a conclusion that the claims, even if later validated, would be subject to the rights-of-way and not vice versa as the contestees contend.

[5] The land, however, remained open to mineral location subject to the rights-of-way. *See A. W. Schunk,* 16 IBLA 191, 195 (1974); *Solicitor's Opinion,* 67 I.D. 225, 228 (1960). Therefore, we must examine whether a discovery after 1970 validated the claims. The only valuable mineral suggested by the record is the possibility of a discovery of feldspathic sands suitable for making glass. For this purpose we assume that sands suitable for glassmaking are not a common variety material. *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 305-08, 80 I.D. 538, 549 (1973); *United States v. Pierce,* 75 I.D. 270, 281 (1968). Two requirements of law dispose of this issue. First, where mining claimants are seeking to validate a group of claims, they must show that a valuable mineral deposit exists on each claim. A showing that all of the claims taken as a group satisfy the requirements of discovery is not sufficient. *United States v. Colonna and Company of Colorado, Inc.*, 14 IBLA 220, 226 (1974); *United States v. Harper,* 8 IBLA 357, 368 (1972). Here, only material from two of the claims was actually analyzed by the Hazen Company. Appellants' experts admitted that variations in the quality and quantity of feldspathic sands could occur on the remaining 16 claims.

It is axiomatic, we believe, that prudent men do not invest their money in attempting to develop a mine without some evidence that the mineral which they seek to exploit exists in such quality and quantity as to permit the recovery of their capital outlay with a profit. Accordingly, it was proper to conclude that the 16 unanalyzed claims were not shown to have discovery of a valuable deposit of feldspathic sands.

[6] Second, the Department recognizes a distinct difference between *exploration* and *discovery* under the mining laws. Exploratory work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those minerals exist in such quantity and quality that there is a reasonable prospect of success in developing a paying mine. Only when the exploratory work shows such a reasonable prospect of success can it be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. *United States v. Converse,* 72 I.D. 141, 149 (1965), *aff'd, Converse v. Udall,* 399 F.2d 616 (9th Cir. 1968), *cert. denied,* 393 U.S. 1025 (1969). In this proceeding, all of appellants' experts testified that their examinations were preliminary and that further testing would have to be accomplished before recommending that production occur on any of the claims. Appellants were thus still at the exploratory stage. We note again that appellants had not yet reached the stage of developing an analysis of the marketability of the feldspathic sands on the claims. As Administrative Law Judge Holt said in his decision (at 8):

> The Hazen report is based on a chemical analysis of one sample from one claim and a visual examination

of samples from each of the other claims. The flow sheet and plan of operation require the utilization of the sand and gravel for all purposes. Since the Department has held that the common variety materials can not be used, it is only the feldspathic sand that is subject to location. There was no evidence that this latter material could be economically utilized by itself and no attempt has been made to determine whether it could compete in the existing market. No prudent man would invest his time and means developing any one of the claims until the technology of processing the feldspathic sand has been completed and a reasonably accurate estimation has been made of the cost of production. Until this has been completed there is no way of determining whether the material could compete in the existing market.

[7] There has not been a discovery of feldspathic sands suitable for use in making glass where, although such mineral has been found within the limits of the claims, the evidence is not of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing the property. *United States v. Duval,* 1 IBLA 103 (1970), *aff'd Duval v. Morton,* No. 72-2839 (9th Cir. December 19, 1973), *aff'g Duval v. Morton,* 347 F. Supp. 501 (D. Ore. 1972). Accordingly, we conclude that all of the claims were properly declared null and void.[8]

[8]In their brief on appeal, appellants place great reliance on *United States v. Kosanke Sand Corp.,* 3 IBLA 189 (1971), which upheld the validity of claims located for feldspathic sands. That decision was later set aside and remanded by this Board. *United States v. Kosanke Sand Corp.,* 12 IBLA 282, 80 I.D. 535 (1973). The facts in the *Kosanke* proceeding are clearly distinguishable from the ones at hand. In *Kosanke,* the exploration of the claims, technique for processing of the sand, existence of a possible market, suitability of the sand for use in glassmaking, all had progressed much further than in this case, yet *Kosanke* was remanded for a hearing to develop further evidence as to the quality and quantity of the silica sand on each claim, the amount of each grade of sand on each claim, the market for each grade, the proposed flotation process for beneficiating the silica sand, and transportation costs. The evidence in this case falls so far short of that offered in *Kosanke* as to leave no doubt that the validity of the claims has not been established.

[8] In their final argument on appeal, appellants charge that the Administrative Law Judge improperly denied their motion to reopen the proceedings for the purpose of introducing new evidence. Appellants allege that they have evidence that will establish the fact that the State of California and its contractors used substantial quantities of sand and gravel from appellants' claims during the course of the construction of the highway projects in 1954-55 and 1968-70. In denying the motion, Judge Holt stated the following:

> In the recent decision of *United States v. A.E. Kottinger, et al.,* 14 IBLA 10 (November 27, 1973), the Board held (syllabus):
>
> > Where the preponderance of the evidence in a contest hearing does not show the existence of a reasonably continuous profitable market for a common variety of sand and gravel from a mining claim, from 1955 to the time of the hearing, the claimants have failed to show a discovery.
>
> This ruling was supported by both administrative and judicial decisions.[9]

[9]In *Kottinger, supra* at 13, we quoted the following from *United States v. Charleston Stone Products,* 9 IBLA 94, 100 (1973):

> [T]he contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the * * * mineral has continued without any prolonged interruption * * *. [I]f the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost * * *. *United States v. Estate of Alvis F. Denison,* 76 I.D. 223 (1969); *Mulkern v. Hammit,* 326 F.2d 896 (9th Cir. 1964). [L]ater recovery of a profitable market cannot serve to resuscitate such invalid claims.

Judicial review of the *Charleston* case has been sought, *Charleston Stone Products Co., Inc. v. Morton,* Civil No. LV-2039-BRT, currently pending before the United States District Court for the District of Nevada. *See also United States v. Johnson,* 16 IBLA 234 (1974); *United States v. Winegar,* 16 IBLA 112, 81 I.D. 370 (1974).

Under the *Kottinger* decision it was incumbent on the contestees to establish that there was a "reasonably continuous profitable market" for the sand and gravel on the claims from 1955 to 1972. Assuming that there was a profitable market for the sand and gravel on one or more of the claims for the periods 1954-1955, and 1968-1970, the gap between 1955 and 1968 is fatal to the contestees' contention of validity.

Accordingly, the motion to reopen the hearing is denied.

For the reasons stated, the Judge was correct in denying appellants' motion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

/s/ Martin Ritvo
Martin Ritvo
Administrative Judge.

We concur:

/s/ Douglas E. Henriques
Douglas E. Henriques
Administrative Judge

/s/ Edward W. Stuebing
Edward W. Stuebing
Administrative Judge

APPENDIX A

	Name	*Date of Location*	*Legal Description*
1)	Sand Bank	March 1, 1953	NW ¼ of NW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
2)	Harbor	March 1, 1953	SW ¼ of NW ¼ Sec. 14, T. 3 N., R. 6 W., SBM
3)	Many Stones	March 1, 1953	NW ¼ of SW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
4)	Wild Trail	March 1, 1953	SW ¼ of SW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
5)	Buck Shot	March 1, 1953	NE ¼ of SW ¼ Sec. 14, T. 3. N., R. 6 W., SBM
6)	Old Sunny	March 1, 1953	SE ¼ of SW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
7)	Outlook	January 5, 1955	NE ¼ of NW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
8)	Delight	January 5, 1955	NW ¼ of NE ¼ Sec. 14, T. 3 N., R. 6 W., SBM
9)	Sunshine	January 5, 1955	NE ¼ of NE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
10)	Baldy	January 5, 1955	SE ¼ of NE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
11)	Hawk	January 5, 1955	SE ¼ of NE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
12)	Old Blister	March 1, 1953	NE ¼ of SE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
13)	Clear View	March 1, 1953	SW ¼ of SE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
14)	Buster	March 1, 1953	SE ¼ of SE ¼, Sec. 14, T. 3 N., R. 6 W., SBM
15)	Lizard Gulch	July 12, 1955	NE ¼ of NW ¼, Sec. 23, T. 3 N., R. 6 W., SBM
16)	Mesquite	July 12, 1955	NW ¼ of NW ¼, Sec. 23, T. 3 N., R. 6 W., SBM
17)	Barren	July 12, 1955	SW ¼ of NW ¼, Sec. 14, T. 3 N., R. 6 W., SBM
18)	Rattler	July 12, 1955	SE ¼ of NW ¼, Sec. 23, T. 3 N., R. 6 W., SBM

APPENDIX "D".

28 U.S.C. § 1331(a).

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

. . . ."

APPENDIX "E".

30 U.S.C. § 22.

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

30 U.S.C. § 35.

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands. . . ."

30 U.S.C. § 611.

SUBCHAPTER II. — MINING LOCATIONS

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used

in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called ''block pumice'' which occurs in nature in pieces having one dimension of two inches or more. 'Petrified wood' as used in sections 601, 603, and 611 to 615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.''

APPENDIX ''F''.

5 U.S.C. § 706.

''To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.''

Supreme Court, U. S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1150

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

DORIA MINING AND ENGINEERING CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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1. Between 1953 and 1955, the predecessors in interest of respondent Doria Mining and Engineering Corporation claimed a discovery of valuable deposits of sand and gravel, and filed 18 association placer mining claims of 40 acres each, in the Cajon Pass area of the San Bernardino National Forest, California (Pet. App. 1-2, 16, 41). In 1968, the United States Forest Service issued to petitioner State of California an easement across portions of land covered by Doria's claims for the purpose of constructing an interstate highway. In 1961 and 1970, the Forest Service issued special use permits to petitioner Calnev Pipeline Company that enabled Calnev to construct high pressure pipelines across lands covered by Doria's claims. Both the easement and the permits were issued subject to

all valid claims, but the State and Calnev did not obtain permission from Doria prior to constructing the highway and pipelines (Pet. App. 2, 10, 16-17).

In December 1970 and January 1971, Doria filed civil actions in state court against the State and Calnev, alleging trespass and inverse condemnation and seeking damages in excess of $15 million (Pet. App. 2, 11, 17). The State and Calnev thereupon initiated a private contest proceeding before the Department of the Interior, pursuant to 43 C.F.R. 4-450-1, asserting interests adverse to Doria's in the lands covered by the mining claims, and alleging that Doria's claims were invalid for failure to discover a valuable mineral deposit within their limits. The United States intervened as a contestant on behalf of the Forest Service. Following a hearing, the administrative law judge found that there had been no discovery of valuable mineral deposits on any of the lands covered by Doria's claims, and accordingly held that Doria's claims were null and void (Pet. App. 18-19). This decision was affirmed by the Board of Land Appeals (Pet. App. 15-40).

2. On March 12, 1975, Doria filed a complaint in the United States District Court for the Central District of California to review the Department's decision. The complaint alleged, *inter alia*, that Doria had been denied a fair hearing because G. Austin Schroter, one of the contestants' witnesses, had been permitted to testify regarding the value of the sand and gravel deposits "on the basis of inappropriate testing methods and on other false premises utilized by him" (R. 7).[1] Thirteen months

[1]"R." refers to the record on appeal.

later, after petitioners and the federal respondents had moved for summary judgment, Doria filed a motion to amend its complaint, alleging that it had uncovered in collateral state court proceedings evidence of fraud and perjury at the administrative hearing.[2] The district court denied the motion to amend, apparently because it believed itself without jurisdiction to consider evidence outside the administrative record (Pet. App. 3-5 & n.2). The court subsequently granted summary judgment affirming the administrative decision (Pet. App. 10-14).

On appeal, the court of appeals vacated the district court's judgment and remanded the case for consideration of Doria's motion to amend the complaint (Pet. App. 1-9). The court acknowledged (*id.* at 5) that the appropriate standard for review of administrative proceedings is whether the administrative findings are supported by substantial evidence in the record as a whole. However, the court held that where "the party seeking review alleges that it has discovered new evidence showing that the decision before the court for review was obtained by a fraud on the administrative proceeding, * * * the

[2]In its motion to amend the complaint, Doria alleged that exhibits introduced in evidence at the administrative hearing purporting to set forth test results on samples taken from Doria's claims "substantially vary and differ from the actual test sheets prepared by the State laboratory," that the exhibits "materially distort" the test results and findings of the State laboratory, and that the State laboratory in conducting the tests "failed to comply with standard procedures established by the State of California for all material testing laboratories * * *" (R. 342). Doria further alleged that this information was not available to it during the administrative hearing and appeal, and that it had only recently come to light in connection with discovery proceedings in the state court litigation against the State and Calnev (R. 342).

reviewing court may consider evidence extrinsic to the record in determining whether such allegations are meritorious" (*ibid.*).

3. The decision of the court of appeals is consistent with the decisions of this Court, does not conflict with the decisions of any other court of appeals and does not warrant further review.

At the outset, it should be emphasized that the decision below is narrow in scope. The court of appeals has not ruled that a court reviewing an administrative determination must always consider the merits of newly raised allegations of fraud. Rather, the court has simply announced a rule that the reviewing court has the jurisdiction, and, in appropriate cases, should exercise its discretion, to hear new allegations of fraud based on evidence extrinsic to the record in order to prevent injustice. In deciding whether to exercise discretion to hear new allegations of fraud, the reviewing court is to consider (Pet. App. 6 n.3, quoting from *Standard Oil Co.* v. *Montedison S.p.A.*, 540 F. 2d 611, 617 (3d Cir. 1976)):

> (1) whether there was "suppression, bad faith, or gross negligence on the part of the plaintiff in failing to raise the issue of fraud before the Board"; (2) whether evidence of the alleged fraud was "reasonably available" at the time the dispute was before the Board; and (3) whether the issue "has been or may be more conveniently and expeditiously raised in another" forum.

Thus, if the district court on remand should determine that Doria could have raised its fraud allegations at the administrative level, it may deny Doria's motion to amend the complaint. Moreover, even if the district court

concludes that the information is newly discovered and that there is merit to the fraud allegations, the court is nevertheless free to determine that the fraud was immaterial to the outcome of the administrative proceeding and that no injustice would result from reinstatement of the summary judgment in favor of petitioners and the federal respondents.

This Court has recognized the general rule that a court reviewing an administrative decision should not consider issues that were not properly raised before the agency. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946). However, the Court has noted that unusual circumstances may arise that "will prompt a reviewing * * * court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941). See *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). Accordingly, the Court has concluded that the failure of a party to raise a then non-existent issue before an administrative agency does not deprive the reviewing court of power to consider the issue once it does come into existence. *NLRB* v. *Jones & Laughlin Co.*, 331 U.S. 416, 427-428 (1947).

The decision below is consistent with these settled principles. As the court of appeals observed (Pet. App. 7), "[n]ewly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record. If the reviewing court, in the face of an allegation that such evidence exists and that administrative remedies have been exhausted, nevertheless confines itself to consideration only of evidence in the

record, the party seeking review is left without any forum in which to argue the allegedly fraudulent basis of the administrative judgment." We agree with the court of appeals that foreclosing review of newly discovered evidence of fraud would defeat, rather than promote, the ends of justice. See *Hormel* v. *Helvering*, *supra*, 312 U.S. at 557.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

Supreme Court, U. S.
FILED
MAR 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1150

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, and CALNEV PIPELINE COMPANY, a Corporation,

Petitioners,

vs.

DORIA MINING AND ENGINEERING CORPORATION, a Corporation, CECIL D. ANDRUS, etc., et al.,

Respondents.

RESPONDENT DORIA MINING AND ENGINEERING CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	PAGE
Preliminary Statement	1
Jurisdiction on Writ of Certiorari	4
Questions Presented	5
Argument Against Petitioners "Reason for Granting the Writ"	6
Conclusion	10
Appendix 1 — Petition to Secretary of Interior	App. P. 1

TABLE OF AUTHORITIES CITED

Standard Oil Co. v. Montedison, 540 F.2d 611 (3rd Circuit 1976)	6

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PRELIMINARY STATEMENT

Here is a case where Petitioners are praying that this Court issue a Writ of Certiorari to review the judgment entered on November 2, 1979 by the United States Court of Appeals for the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit after long and careful deliberation herein, determined that "Newly discovered evidence of fraud and perjury in an administrative proceeding will not be found in the administrative record". The Ninth Circuit went on to say that "If the reviewing court, in the face of an allegation that such evidence exists and that administrative remedies have been exhausted,

nevertheless confines itself to consideration only of evidence in the record, the party seeking review is left *without any forum in which to argue the allegedly fraudulent basis of the administrative judgment.*" (emphasis added) (page 7 of Appendix "A" to Petition for Writ of Certiorari).

Respondent DORIA is the one who would be prejudiced by such fraud and perjury. The United States Court of Appeals for the Ninth Circuit went on to state that "we conclude that importance of preventing the prejudice to Doria and similarly situated parties which arises out of circumstances such as those before us, *outweighs any countervailing interest which administrative agencies and other parties which appear before them may have in the finality of agency decisions.*" (emphasis added) (See page 8 of Appendix "A" to Petition herein.)

Admittedly by Petitioner's opening statement, only the State of California acting by and through the Department of Transportation and Calnev Pipeline Company are petitioning this Court for a Writ of Certiorari. (Page 1 and 2 of Petition) This is interesting because it is *they* who are the ones charged by Respondent Doria with fraud and the use of perjured testimony. It is clear that only *they* appear to be unhappy with the decision of the United States Court of Appeals, Ninth Circuit, which remands this case back to the United States District Court for a determination of the alleged fraud.

Respondent's Secretary of the Interior and Douglas Leisz as Regional Director of the United States Forest Service and Harold Mitchell as Acting Forest Supervisor of the San Bernardino National Forest have not joined in the petition before this Court. (Page 2 of petition) Said Respondents obviously feel that if there was fraud and perjury as alleged herein, it should be heard and determined by the District Court rather than sidetracked by the abuse of legal process and legal technicalities which could take Respondent Doria ten more years to obtain a hearing thereon (providing Doria can continue to hold out and fight the injustice to them for ten more years).

Administrative Law Judge Graydon E. Holt ruled that Respondent Doria's 18 unpatented placer mining claims were null and void for *lack of discoveries of valuable mineral deposits.* While the State of California admitted at the Administrative Hearing that there was market for commercial and road building material in Victorville. some 16 miles away from the 18 Doria placer mining claims, Petitioners State of California have argued that the Doria material was worthless and hence not valid as valuable mineral deposits. The proof used by the petitioners at the Administrative Hearing was the testing results as spelled out in Exhibit 14A and testified to by the State's key witness, George A. Schroter.

After the hearing of Administrative Judge Holt, Respondent Doria discovered that the tests as shown by Exhibit 14A were fraudulent and that they were improperly conducted. Doria also learned by examination of Petitioner Calnev aerial photographs and aerial photographs of the United States Forest Service, all of which were taken of the Doria Placers *before, during* and *after* the construction of Highway Interstate 15, that the contractor hired by Petitioner State of California, mined and used more than 1,000,000 tons of road building material from Doria's 18 Placer Claims for the construction of Interstate Highway 15. Additionally Doria learned that the invitation for bids on the construction of the I-15 published by the State of California specifically required that all concrete aggregate materials which were to be used in said construction must come from Lytle Creek and Cleghorn some 12 to 18 miles south of the Doria placer claims.

The United States Court of Appeals, Ninth Circuit, after long and careful deliberation determined that Doria's allegations of fraud and perjury should be heard by the lower court so as to avoid injustice to Doria and furnish Doria a forum in which to have their day in court.

Petitioners herein clearly appear to be urging that the United States Court of Appeals did not know what they were talking about and misunderstood all the evidence and arguments regarding fraud and perjury that were made before them.

Petitioner desires to make any hearing on fraud and perjury moot by urging the United States Supreme Court, at this time, to review the decision of the United States Court of Appeals, Ninth Circuit, and reverse them. If certiorari is granted in this case, petitioners will avoid any confrontation with the fraud and perjury in the United States District Court, which court is the only forum where it can be heard. (See petitioners Appendix "A" page 8 footnote 6) Petitioner well knows that the United States Supreme Court will not grant a de novo hearing on the alleged fraud and perjury or make any determination whatever of the fraud issue.

Respondent Doria has already requested a rehearing on the fraud and perjury issues by the Department of Interior, which request and petition was denied on the grounds that it was up to the United States District Court to hear the matter. See Appendix "1" of this brief in opposition to certiorari which is a copy of Doria's petition for rehearing.

JURISDICTION ON WRIT OF CERTIORARI

A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Respondent Doria respectfully submits that the "special and important reasons" urged by petitioners to this Court for a Writ of Certiorari are simply that "*continued litigation is needless and constitutes an unwarranted burden on the courts.*"

Petitioners are now seeking intervention by the United States Supreme Court in this case hoping to preclude Respondent Doria from having a forum in which to determine whether

fraud and perjury was used by petitioners which deprived Respondent Doria of valuable property rights. PETITIONERS HAVE ALREADY CAUSED MORE LITIGATION AND BURDENS ON THE COURTS BY THEIR MOTIONS AND APPEAL TO THIS COURT THAN IF THEY WOULD HAVE LET UNITED STATES DISTRICT COURT JUDGE WHELAN HEAR THE FRAUD AND PERJURY.

QUESTIONS PRESENTED

Petitioners raise two questions in their Petition for Writ of Certiorari. Both of these questions simply boil down to the allegation that Respondent Doria's 18 forty acre placer claims should be declared null and void because the administrative record reveals that there was no "discovery of valuable minerals" by the locaters of said placer claims. The "discovery of valuable minerals" is essential in order for Doria to prevail in a validity contest such as was brought here by petitioners.

In both of these questions presented, petitioner assumes fraud for the sake of argument, and then goes on to state that if such fraud were disregarded, the administrative record as a whole was not sufficient to show that such placer claims were valid because there were no valuable mineral deposits discovered.

However, once they assume, even for argument purposes, that the fraudulent evidence and perjury is disregarded, who is to say that the whole raft of evidence which petitioner claims "as a whole reveals no discovery of valuable minerals", was not also tainted by fraud and perjury?

The United States Court of Appeals, Ninth Circuit felt that not just Exhibit 14A but all the allegations of Respondent Doria should be heard by Judge Whelan of the United States District Court regarding fraud and perjury. Fraud is like a cancer which affects the whole body. One cannot just remove a portion thereof and expect the balance to be unaffected.

ARGUMENT AGAINST PETITIONERS "REASONS FOR GRANTING THE WRIT"

On page 10 of the Petition, Petitioners urge that the Court of Appeals reached their conclusion without considering the record as a whole. This is absurd. The court stated at page 5 of their decision (Appendix "A" of this petition on page 5) as follows:

> "When however, the party seeking review alleges that it has discovered new evidence showing that the decision before the court for review was obtained by a fraud on the Administrative proceeding, we hold that the reviewing court may consider evidence extrinsic to the record in determining whether such allegations are meritorious."

The Court of Appeals in Doria considered the whole record before it and decided that (even though the main alleged newly discovered fraud and perjury related to the sample test results, Exhibit 14A) there were other items of evidence supported by fraud and perjury which certainly were such as to infect the Administrative Board's determination. The Court of Appeal cited the *Standard Oil Co. v. Montedison* case, 540 F. 2d 611 F.2d 1976) as instructive.

In the *Montedison* case, the United States District Court Judge believed that he was not empowered to consider an issue that had not been raised before the Administrative Board. Therefore, the United States District Court Judge denied plaintiffs' motion to amend on that ground. The United States Court of Appeals, Third Circuit, held contrary thereto and its ruling is cited by the Ninth Circuit in this case at page 6 of Petitioner's Appendix "A" as follows:

> "In appropriate circumstances the district court may, in [a Section 146] action, in the exercise of a sound discretion, permit an issue of fraud which infected the Board's determination to be raised though it was not raised in the interference proceeding."

Again with respect to the two questions here presented by petitioners, assuming arguendo that there was no fraud and perjury, or that the fraud that was practiced and the perjury which was committed was not directly responsible for the Administrative Law Judge's decision, the record nonetheless demonstrates evidence before the administrative tribunal regarding the "discovery of valuable minerals." Petitioners urge just the opposite, i.e. that no discovery was shown.

Besides Doria having put on sufficient evidence of "discovery" and "marketability" by their own witnesses, the Administrative Hearing record clearly shows that the petitioners proved Doria's placer claims were valid by their own witnesses. The testimony and evidence given by the State's witnesses Mr. Schroter, Mr. Twing and Mr. Hove proved *continuous marketability* from the date of discovery in 1953 to the date of the hearing in 1973. Then this marketability evidence was destroyed with a fraudulent sampling testing program, which test results were given with Exhibit 14A. The testing itself was done in a false and fraudulent manner so that the results as shown on Exhibit 14A would not show valuable minerals but rather worthless fill material.

Petitioners urge on page 16 of their petition that *"this is a case where a single set of test results embodied in a single document"* (Exh. 14A) is challenged by Doria. They then go on for 2 more pages (Pages 17 & 18) to argue that there was no marketability proven nor was there any demand for the Doria material. The Administrative record shows just the opposite. This fact was also seen by U.S. Court of Appeals, 9th Circuit, who obviously didn't buy petitioners' arguments.

When private validity contest R4873 was held in 1973, petitioners failed to put on their prima facie case required by law to show that the claims did not have continuous marketability. Quite to the contrary, the State's witnesses Mr. Schroter and Mr. Twing both testified and proved continuous marketability. Their testimony was that from the early 1950's through 1967, the Barstow deposits (located about 31 miles north of

Victorville) and the Oro Grande deposit (owned by Twing and about 6 miles north of Victorville) were the only two deposits of any importance supplying the Victorville markets during those years. Twing and Schroter also testified that the Doria deposits were 16 miles south of Victorville. Their own evidence and testimony shows that Twing's Oro Grande deposit had a 25 mile haulage advantage over the Barstow deposits and a ten mile haulage advantage over the Doria deposits to the Victorville markets. The evidence further shows that Twing's Oro Grande deposit did not put the Barstow deposits out of business with his 25 mile haulage advantage over the years of 1950 through 1967.

Accordingly, the Barstow deposits still were selling in Victorville. Meanwhile, the Doria deposits were sitting only 16 miles away from the market, making said Doria deposits 15 miles closer to the market than the Barstow deposits. Therefore, it would be impossible for Twing's Oro Grande deposit to put the Doria deposits out of business with only a 10 mile haulage advantage because there was good continuous marketability of the Doria deposits. This is precisely why the petitioners herein had to use a fraudulent sampling testing program to show the Doria deposits of sand and gravel as worthless material thereby destroying said marketability.

Therefore, for Petitioners to argue that there was no marketability for the Doria deposits is absurd. After all, if there is no market for the materials when dealing in common variety minerals, why would the State waste thousands of dollars with sampling and testing of the Doria placer materials that they couldn't sell? In other words, if Doria's placers were worthless materials and not good, why would petitioners have needed to use a false and fraudulent sampling and testing program to show they were no good? You don't test worthless materials. If it had been unmarketable and worthless, Owl Rock would not have taken a lease on the Doria property for 1,000,000 metric tons, and, Petitioners would not have used over

1,000,000 tons thereof to build I-15. Also, Petitioners would not have built the 1930 freeway out of the Doria materials as shown by Exhibit 17 of the Administrative Hearing exhibits.

The State's witness Mr. Ed Curtain testified that they were going to sink a 30 foot pit in Section 14 of Doria and mine approximately 300,000 tons of sand and gravel to make concrete aggregates for the I-15 and to make such concrete aggregates out of pit run material without water or processing. (Exhibit 23 of Administrative Hearing). This impeached Mr. Schroter's testimony regarding Exhibit 14A test results which showed the Doria materials as worthless.

The State's witness George Twing testified that he never went on the Doria placer claims to evaluate them but he testified from the test results of Exhibit 14A to base his marketability testimony on.

The State's witness Robert Hove testified that he took one sample from the Doria placer claims (Exhibit 25) and had it tested. He said he could not remember whether the sample had the clay and the fines taken out of it. Administrative law Judge Holt said he could not give any weight to Hove's testimony if Hove did not know whether he took the clay or fines out before testing.

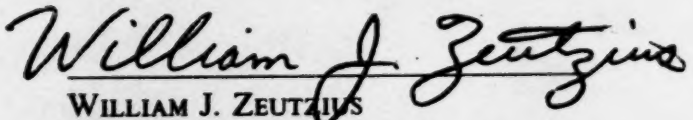
From the foregoing evidence of Mr. Curtain, marketability and good quality materials were proven. It did not, as petitioners contend, show worthless materials.

Mr. Hove also supplied Exhibit 24 which was a mine map of the placer deposits showing in red ink the location of the water well.

CONCLUSION

It is respectfully submitted that Petitioners request for a Writ of Certiorari should be denied and that a hearing in the U.S. District Court on the fraud and perjury, which went to the very core of the Administrative Agency decision, should proceed as ordered by the U.S. Court of Appeals, 9th Circuit, without further delays.

Respectfully submitted,



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PETITION ON BEHALF OF

DORIA MINING AND ENGINEERING CORPORATION

TO THE

SECRETARY OF THE INTERIOR

FOR A REHEARING OF VALIDITY CONTEST R-4873

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May 5, 1978

APPENDIX 1

TABLE OF CONTENTS

	Page
Memorandum	
1. The Secretary of the Interior Has Full Discretion to Reopen a Hearing at Any Time	2
2. This Case Fully Merits A Rehearing	6
A. Factual Background	14
(i) The Doria Case	15
(ii) Contestants' Case and Its Subsequent Undermining	20
(a) Improper Sampling of Materials	29
(b) Improper Testing of Materials	38
(c) False or Inaccurate Testimony Concerning Marketability	48
3. Conclusion	52

PETITION

TO: CECIL D. ANDRUS, Secretary of the
United States Department of Interior

FROM: Doria Mining and Engineering Corporation

RE: Request for Rehearing of Validity
Contest No. R-4873

This memorandum constitutes a petition, on behalf of Doria Mining and Engineering Corporation (hereafter "Doria") for a rehearing of validity contest R-4873. This petition is based on the fact that newly discovered evidence uncovered by Doria in state court inverse condemnation and trespass actions against the State of California, CalNev Pipeline Corporation (hereinafter "CalNev") and the Vinnel Corporation (hereafter "Vinnell")*/ shows that the core testimony upon which the Administrative Law Judge (ALJ) and the Interior Board of Land Appeals (IBLA) based their decisions adverse to Doria was false, misleading and inaccurate. The deficiencies in this testimony are so severe and the unfairness perpetrated upon Doria by the contestants is so extreme as to undermine the integrity of the entire administrative fact-finding process. Absent the tainted

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*/ These cases are Doria Mining and Engineering Corporation, et al. v. State of California, et al., No. 152504, Superior Court of the State of California for the County of San Bernardino; and Doria Mining and Engineering Corporation v. Vinnell Corporation, No. CW-8728, Superior Court of the State of California for the County of San Bernardino (Vinnell was the prime contractor for the construction of Interstate 15).

evidence introduced by contestants, there is no basis, substantial or otherwise, to support the IBLA decision. For these reasons, and as is more fully developed below, the case should be reheard.

1. The Secretary of the Interior Has Full Discretion to Reopen a Hearing at any Time.

The Department of the Interior (DOI) has created a review and appeal procedure that provides recourse from the decisions of its administrative law judges. Within this system, the determination of a board of appeals (in this case the Board of Land Appeals) is final, except for the power of a Board to reopen its proceedings [43 CFR 4.21(c)], and the power of the Secretary to conduct a further review of the Board's action. [43 CFR 4.5].*/

Although the fact situations where the Secretary has exercised his discretion to reopen proceedings vary, among the most typical cases have been those where error or fraud was committed at the hearing level. This principle

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*/ 43 CFR 4.1 provides that the Office of Hearings and Appeals "is an authorized representative of the Secretary." Section 4.5 specifies that "nothing in this part shall be construed to deprive the Secretary of any powers conferred upon him by Law." This provision has generally been construed by OHA and by the Secretary as reserving to the Secretary part of the power originally conferred on him by the Congress, i.e., the power to decide for himself cases on appeal at any stage of the proceedings, including reconsideration of the Board's final decision.

was stated succinctly in R.M. Barton 7 IBLA 230, September 12, 1972:

> "He [The Secretary] will not blindly or inflexibly adhere to prior decisions and stands ready to correct error, even if it be of long standing..."*/

In the present case, Doria requested the IBLA to reopen the hearing shortly after its decision was rendered. Doria asserted that it had acquired new evidence showing that materials from its claims were actually used to construct Interstate Highway #15 during the period 1968-1970. The new evidence would not only have established that markets existed for the Doria material; it would have also shown the duplicitous conduct of the State. This request was denied, because the Board erroneously concluded that even if Doria could establish a limited highway market for its material, it could not prevail in showing that it had made a valid discovery.

Similarly, in late 1975 and early 1976, a second request by Doria for reopening of the DOI hearing was denied, this time on the grounds that the matter was pending before the federal court (Letter of January 4, 1976 from James Muir to Undersecretary Kent Frizell of the Department of the Interior, and Frizell's response of January 23, 1977. Doria

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*/ In this case the Board found that the appellant had failed to present any new arguments to show that error had been committed in the earlier decisions; however, its statement of the law has been followed in other cases.

had filed its complaint appealing the DOI decision on March 10, 1975). Interior seems clearly to have taken the position prior to the filing of the Doria appeal that it would not reopen the case on its own, and thereafter, it would do so only in response to a court order. The district court, on the other hand, stated that it considered the case appropriate for remand but erroneously concluded that it lacked the power to send it back to the agency.

As Doria's Reply Brief filed before the Ninth Circuit makes abundantly clear, the district court had full authority to send the case back at any stage of the proceeding.

It is hornbook law that a court sitting in review of a ruling of an administrative agency is vested with full equity powers that permit it to tailor its relief to the exigencies of the case in order to insure a just result. Indiana and Michigan Electric Company v. Federal Power Commission, 502 F.2d 336 (D.C. Cir. 1974). Moreover, the power to remand a case to the agency for further proceedings has been held to be implicit in the court's reviewing power, as established under the Administrative Procedure Act (APA). Secretary of Labor of the United States v. Farino, 490 F.2d 885 (7th Cir. 1973). The guiding purpose of remand under

judicial review is "consonant with that of the administrative procedure itself -- to secure a just result with a minimum of technical requirements." Ford Motor Company v. National Labor Relations Board, 305 U.S. 364, 373 (1939).

Remand is particularly appropriate where the state of the record may preclude a just result. Fleming v. Federal Communications Commission, 225 F.2d 523, 526 (D.C. Cir. 1955). It has frequently been ordered when circumstances arise after the issuance of an administrative decision that may affect the propriety of that decision. National Labor Relations Board v. Jones and Laughlin Steel Corporation, 331 U.S. 416-428, See Fleming, supra, at 526. The fact situations where remand has been deemed particularly appropriate correspond closely to the circumstances in this case. In Greater Boston Television Corporation v. Federal Communications Commission, supra, the court stated:

> "The clearest case for remand appears when there is an allegation of impropriety comparable to a charge of fraud upon the agency... This court's decisions in various cases also reflect a doctrine where there has been a change in circumstances, subsequent to administrative decision and prior to court decision, that is not merely 'material' but rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case." (Emphasis added.) (Id., at 283.)

In short, it is abundantly clear that the DOI could have reopened the hearing at any point up to and

until the federal court assumed jurisdiction: thereafter, the court was empowered to effect a remand either on its own initiative or in response to a request from Doria. At present, DOI can reopen the hearing if the Court of Appeals orders it to do so or, if the Court permits Doria to withdraw or stay its appeal. In the latter case, the Secretary can exercise his discretion to reopen. This petition seeks to obtain a commitment from the Secretary that he will exercise that discretion if the Court of Appeals relinquishes jurisdiction; if the Secretary agrees, Doria will take immediate steps to withdraw its appeal or to secure a stay pending DOI review. The Secretary's grant of this petition will save Doria a significant amount of time and money */ and will correct serious past injustices.

2. This Case Fully Merits A Rehearing

The history of this case is that of a continuing miscarriage of justice. Simply put, the predecessors in interest to appellant Doria Mining and Engineering Corporation,

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*/ The Court of Appeals has not yet scheduled oral argument in the case; once it does, months will pass before a decision is rendered. Further, it is entirely possible that the Court of Appeals will remand to the District Court because of the limited record developed below. Altogether as much as two years could pass before the same result is achieved as Doria is seeking in this Petition.

located 18 placer claims in the San Bernardino Valley during 1953 and 1955. Because of their inexperience and lack of business acumen, these claimants, while investing thousands of dollars in the claims, were unable, prior to the late 1960's to begin production of sand and gravel and the other common variety minerals contained on the property. In the late 1960's, the situation began to improve with the creation of Doria and the initiation by it of determined efforts to move into production. */ However, coincident with the creation of Doria, the series of events occurred that eventually undermined Doria's property rights and resulted in this litigation.

In 1961, 1968 and 1970, the State of California and CalNev obtained easement and use permits to traverse the property on which the Doria claims were located for the

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*/ The owners of the claims made several and repeated efforts to move them to production. The mining property tax statements of 1960 and 1961, for example, show that the owners had stockpiled 2,000-3,000 yards of material respectively (Exhibit No. 1). The purpose of the stockpiling was to pursue development of the materials. Similarly, during 1964, the individual property owners negotiated with Owl Rock Co. for the development of the claims. An option contract was signed whereby Owl Rock agreed to attempt to sell the material on the local highway construction market. Doria believes that the reason Owl Rock did not succeed in its efforts is because of pressure put on it by the U.S. Forest Service. During 1964 and 1965, the property owners contracted with Mr. Omar McDonald, a purported mining expert, for development of the claims. McDonald misled the investors, costing them more than $100,000 and diverting them from actual production. In the late '60's, Mr. James Muir, the current President of Doria and an individual with extensive mining experience began consulting the owners. As a result of his efforts, the company was taking the necessary steps to begin production when it was stopped short by contestants' validity contest.

construction of an interstate highway and a pipeline. This construction was initiated and completed without any effort to obtain the approval of Doria. Thereafter, these same parties instituted a validity contest before the Department of Interior seeking to have Doria's claims declared worthless. This result was achieved with the issuance of the Administrative Law Judge's opinion on December 26, 1973, and with its affirmance by the Interior Board of Land Appeals on October 31, 1974.

The hearing conducted as part of that contest -- which has become the cornerstone of all subsequent rulings in this case -- was, at best, characterized by conflicting evidence. Doria produced witnesses with both practical and analytical backgrounds who testified that the 18 placer claims included feldspathic sand suitable for the manufacture of glass, as well as mica, fine aggregate, coarse aggregate and other materials. These witnesses testified that the tests they had conducted clearly established the existence of mines and advised additional testing and development work to determine the precise type of plant needed for the mining. Further, the Doria witnesses testified that: a combined production of sand and gravel and feldspathic sand was feasible for the claims, even though either product could be profitably marketed by itself; that there were more than adequate markets in the area for the Doria materials, including

local building markets as well as highway construction projects, that would insure the profitability of the undertaking; and that an adequate supply of water existed to sustain the processing of the sand and gravel.

The State and CalNev, for their part, relied principally on the testimony of G. Austin Schroter (whose testimony comprised over 250 pages of the hearing transcript). Schroter testified, in summary, that the material from the Doria properties that he had tested was so substandard as to render it unmarketable, and that, in his opinion, the owners would be imprudent to invest any additional funds in the development of their claims. Schroter's testimony as to the quality of the Doria materials relied almost exclusively on laboratory tests conducted by the San Bernardino District 08 Materials Laboratory of the State of California (hereafter frequently referred to as the state testing lab), on samples taken by Schroter from the Doria properties.

A second witness for the contestants, who testified concerning marketability, based his conclusions as to product quality on the Schroter test data. Two other minor witnesses reinforced the Schroter conclusions, but could not have stood on their own as establishing a case of no discovery or no validity. In regard to the question of the availability of water, the contestants failed to rebut Doria's case.

The hearing resulted in a conclusory, largely unsubstantiated decision adverse to Doria. From the date of this decision until the present, Doria has persistently attempted to have that decision overturned but has met with a series of procedural irregularities and due process violations that threaten the integrity of the federal administrative review and appeal process. These include the following:

• A key question relating to marketability in the hearing (and one that the ALJ had raised), was whether or not the highway projects conducted during the period 1953-1975 in the area of Doria's claims could have or did use materials from those or adjacent claims; when Doria requested the IBLA to reopen the hearing to admit evidence showing not only that such a market existed but that materials from Doria had been used to build the highways, this request was flatly denied.

• When Mr. James Muir, one of the principals of Doria, became suspicious that the testimony submitted by Schroter, as well as the test results upon which it was based, were fraudulent or grossly inaccurate, he requested the DOI to conduct a rehearing in the case (a course of action fully within the DOI's competence)*/; but this opportunity, too, was denied. (Correspondence

*/ See 43 CFR, Sec. 4.21(c) and Sec. 4.5.

of December 1975 - February 1976 between Muir and DOI officials appended to Plaintiff's Notice of Motion to Supplement the Record, etc., May 26, 1976).

• Most significant of all, when, as the result of lengthy and complicated depositions conducted by Doria attorneys in a state inverse condemnation suit against the State and CalNev,*/ it was specifically demonstrated that Schroter had lied or distorted crucial facts pertaining to his sampling and testing procedures and that, further, this deception had been glossed over or validated by the state testing laboratory, Doria moved to amend its complaint in the District Court. This effort to amend, even though it put into question the validity of the central core of the contestants' case (and the main basis of the ALJ's decision), was vacated without opinion, explanation or review. (Plaintiff's Notice of Motion to Amend the Complaint ... and accompanying documents, April 26, 1976, and the Court's Notice of Vacating and Hearing on the Motion.)

• Similarly, Doria's efforts to stay the District Court proceedings pending a remand to the DOI for consideration of new evidence (and evaluation of the now tainted

*/ Doria Mining and Engineering Corporation, et al. v. State of California, et al., No. 152504, Superior Court of the State of California for the County of San Bernardino.

prior evidence) or, in the alternative, to enlarge the record before the District Court, were denied without explanation. (Plaintiff's May 25, 1976, Notice of Motion, supra.) Doria's last ditch effort to obtain relief from the court, through the filing of a Rule 60(b) motion for relief from a judgment based on erroneous or false evidence, was also rejected. (Plaintiff's 60(b) Motion, October 29, 1976.)

In short, Doria exercised every procedural option available to it to bring to the attention of the DOI and the District Court the newly discovered evidence obtained through the state court proceedings. At the very least, Doria established in its various pleadings that the newly discovered evidence seriously undermined the integrity of the DOI administrative fact-finding process and that, given that uncertainty, it was seriously questionable whether the agency had achieved a just result. Under these circumstances, the District Court was obligated to remand the case to the DOI to determine the weight to be accorded the original Schroter testimony in light of the new evidence and to reassess the competing claims of the two parties. The court's repeated refusal to provide this relief constitutes reversible error. Although Doria believes that the Court of Appeals will eventually correct the error of

the District Court and order a rehearing, it is hereby requesting the Secretary to avoid the lengthy delays inherent in that process and to commit the Department to a hearing immediately.

None of the arguments raised by defendants in the court proceedings is a proper bar to rehearing. Defendants attempted to distort Doria's request for remand by characterizing it as a demand for a trial de novo or a collateral attack on the administrative proceedings; they argued that Doria's attempt to amend its complaint because of newly discovered evidence was too late (Doria either did or should have known all the facts it alleged at a much earlier date). They contest the grounds for amendment by denying that there was fraudulent or erroneous testing; they argue that there was no fraud because the allegedly defective evidence was not intended to mislead; and finally, they argue that even if some of the evidence introduced by the defendants and relied upon by the DOI and the District Court was fraudulent or distorted, Doria should lose in any event because it failed to present an adequate affirmative case to show that it had made a valuable discovery of common variety or other minerals.

Doria's response to defendants' contentions, as is more fully developed below, is simple. The DOI clearly found defendants' testimony and evidence at the administrative hearing more compelling than the case presented by Doria; in deciding for defendants, it interpreted the evidence presented

Hazen test results and the related testimony introduced by Doria which showed the Doria materials to be well within industry standards. However, the ALJ accepted Schroter's testimony as controlling, apparently because of the aura of official confirmation (i.e., the work of the state labs) surrounding his work.

Besides testifying to the quality of the materials, Schroter offered extensive testimony to show that there were no available markets for the Doria materials. The contestant relied upon him to establish that Doria materials had not bee used for the construction of either Highway 31 in 1954-1955 (Tr. 161) or Interstate 15 in 1968-1970. (Tr. 96.) In regard to the former, Schroter stated that he had examined the soil sheets or test sheets maintained by District 8 and that they "all indicated that it (the material) was unsuitable." (Tr. 161.)

The contestants also relied on Schroter to establish that there were no markets in the Victorville and San Bernardino areas for the Doria products. On that subject, Schroter indicated that he had conducted a study of the existing markets and the available sources of supply and had concluded that the Doria products would not have a market. (Tr. 200-220.) Based on interviews with potential purchasers, Schroter stated that many of

them were too distant from the Doria claims,*/ that the Doria materials were inferior and that there was no interest in a new commercial source.

Schroter's testimony on available markets was both inaccurate (see footnote at the bottom of this page) and insubstantial. When questioned concerning haulage distance to some of the potential markets, Schroter revealed a somewhat cavalier attitude toward his marketing study:

> Q. What mileage did you assume would be an appropriate haulage distance for this straight territory area?
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> A. I didn't assume any distance would be an appropriate haulage distance, because there is nothing commercial to haul.

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*/ Schroter's testimony in this regard was significantly inaccurate. In attempting to show that Barstow area plants would have served Victorville better than Doria because of haulage advantages, he testified as follows: Q. "Would the Barstow plants have also served the Victorville trade area?" A. "Yes, sir." Q. "How far is Barstow from Victorville?" A. "Well, I'd have to guess. In order of a magnitude of about 15 miles." (Tr. 206.) A check of the area road map shows Barstow is about 31 miles north of Victorville. Appellant is 16 miles from Victorville (Tr. 359.) A number of Doria's competitors work out of Barstow which is 31 miles from the market. If an extensive study was made as Mr. Schroter testified, he should at least have known the distance from one large city market to the other.

by Doria in light of that decision. The key element of defendants' presentation - and those expressly relied upon by the IBLA and the ALJ -- were the test results and related evidence produced by Schroter. As Doria attempted to demonstrate to the court below, it has since discovered evidence that shows Schroter's testimony to be contradictory, incomplete, inaccurate and probably fraudulent. This newly discovered evidence taints all of the evidence introduced by contestants and totally undermines the administrative decision in favor of California and CalNev. It clearly requires a new hearing. Absent the challenged evidence there is no "substantial basis" for the DOI decision.

Doria considers defendants' arguments that they should prevail even if the challenged testimony by Schroter and the related testimony based on his tests is removed, to be frivolous; however, if this approach is adopted, it is clear that Doria presented ample evidence during the DOI hearing to demonstrate the value and marketability of its claims.

A. Factual Background:

The basic issue underlying these entire proceedings is whether Doria had a valid mining claim, that is whether a valuable mineral deposit had been discovered on its claims as of July 23, 1955. The standard to be applied in reaching this decision has been described as follows: A discovery exists

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine... Castle v. Wombie, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

As noted above, Doria contends that the evidence it introduced before the DOI ALJ was sufficient to establish such a discovery. The following is a brief summation of those portions of Doria's case, as reflected in the administrative record, that established the validity of Doria's discovery.

(i) The Doria Case. No production or actual mining has occurred on the Doria claims; however, substantial testing and investigatory work has been undertaken (Tr. 496-1069). Because no significant changes occur over the years in sand and gravel deposits (Tr. 92), the tests conducted by Doria in the '60's and '70's provide a valid indication of the value of the claims at the time of location in 1953 and 1955. Primary elements in establishing a discovery are: the quality of the materials, their accessibility to profitable markets and the availability of water for processing purposes (Tr. 329). It was established beyond question that a suitable supply of water existed for the Doria claims in a hidden well that has been closed off by one of the owners. (Tr. pp. 554-566, 1007-1012).*/

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*/ The ALJ acknowledged this point, stating to Doria's attorney: "Well, you have established that there was water in the area. Now the Government will have to come up with something to refute that information and, obviously, they don't have any witnesses for that purpose." (Tr. p. 1012). No refutation was made by the Government on the record.

In regard to the quality of the materials on the Doria claims, two witnesses (Myertons and Muir, Tr. 815-993 and Tr. 994-1179) testified for Doria concerning the quality of the sand and gravel and related materials on the property; and one witness (Billings, Tr. 685-815), addressed himself to the quality of the feldspathic sand. Billings, a glass expert, testified that either a plant producing feldspathic sand alone or one producing such sand in conjunction with a sand and gravel operation would be profitable. He testified that the Doria feldspathic sand was of a quality that could be used in the glass industry (Tr. 622), that it was competitive with existing markets both in 1955 and at present (Tr. 635-637). Billings recommended that the claimants move ahead to production and indicated that the next step would be the performance of additional tests, prior to investment in the processing plant. (Tr. 642).

Myertons testified that the Doria materials were fairly consistent throughout the claims.*/ He stated unequivocably that it is technically feasible to produce a range of products from the Doria materials including

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*/ The Hazen Research group took two large (120 gallon samples) from two claims reaching a depth of 25 feet on each (Tr. 499-515). This was done after they had determined on the basis of smaller (5 gallons) samples, taken from each of the other 16 claims, that the materials were generally homogenous. Although the contestants challenged the limited number of 120 gallon samples taken by Hazen, their chief witness, Schroter, repeatedly conceded that the claims were homogenous. (Tr. 239, 306).

feldspathic sand, mica, magnetic, fine aggregate and coarse aggregate. Myertons concluded that his test results had been sufficient to establish that a prudent man would proceed with production. (Tr. 850, 853-854). Myertons also testified that he would advise further testing, but that this would go to the specifics of the plant and production methods, not to a determination of whether or not there was a valuable discovery. The exchange on this issue was as follows:

> Q. Mr. Myertons, in connection with the questions and answers put and given in connection with the testing that was done of the samples, you indicated that had there been more time and at a farther stage of the testing prior to plant design, you would recommend that all 16 samples be tested. Is that a fair summary of your statement yesterday?
>
> A. Yes, I believe so.
>
> Q. Why, for what purpose?
>
> A. Testing of a larger number of samples would give us a better measure of the variance that one might expect in the feed material to be treated by the plant. Therefore, we would expect that the design engineers would have a better foundation on which to select the size of the individual pieces of equipment which might go into that plant; and this, again, would be normal, prudent practice in the course of a process development and the course of designing a particular plant.
>
> Q. Is it then your testimony that the additional testing of the samples already taken is related not to the question whether or not there is a mine, but as to the type of plant that would be designed to mine it?
>
> A. That would be my purpose, sir. (Tr. p. 975.)

Mr. Muir testified, based on his inspection of the property and his review of assays and other analyses performed on the property, that a 1.2 million dollar plant would be feasible and profitable on the property. (Tr. 1021; 1060.) Muir also testified that he had conducted a marketability study that demonstrated a demand for the Doria materials in both public and private markets. Among other things, Muir indicated that significant markets existed in 1953-1955 for the construction of Interstate 15 (Tr. 1069-1070). As noted above, further evidence concerning marketability was provided in regard to feldspathic sand by Billings.

In addition to the oral testimony of witnesses at the DOI hearing, Doria has compiled documentary evidence demonstrating the value of its claims. At the DOI hearing, Doria introduced detailed test results and analyses prepared by Hazen Research, Inc. and Western Testing Laboratories showing that the materials on the claims were more than adequate to meet industry standards (See Enclosure 2 and Exhibit G, Tr. 1205 R-4873). Another key document is the U.S. Geological Survey Mapping conducted for DOI by T.W. Dibblee, Jr. in 1956 and 1958 (this was introduced as an exhibit to the hearing by contestants, Tr. 91, 116). The Dibblee mapping covers the area where the Doria placer claims are located. It indicates that the predominant geological formations of

the area are: QA -- quantinary alluvium; QSG -- quantinary sand and gravel; and TC -- tertiary conglomerate -- sand and gravel. Official California state publications indicate that in the Southern part of the state, QA is the predominant geological deposit mined for sand and gravel aggregate purposes;*/ QSG and TC also constitute materials of high demand for commercial sand and gravel operations.

The third key document is the Materials Report for the proposed construction of State Highway 31 issued May 25, 1951 by the California Division of Highways (Enclosure 3). That report states that materials in the area of the placer claims were found adequate for construction of the proposed highway (pp. 4-9). The report further states that the present road, built in 1930, utilized materials from the area encompassed by Doria's claims and that these materials were highly durable.**/

A fourth important source of documentary evidence are the topographical maps created by computer from aerial photographs showing that during the years 1969-1970, the Vinnell Corporation, a subcontractor of the California

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*/ See Doria v. Vinnell, supra, Plaintiffs' Points and Authorities in Opposition to Demurrer, at p. 3, October 15, 1974.

**/ Specifically, the report stated: "Though the existing surfacing shows some signs of cracking and drying out, it is still in good condition, especially considering its age and the volume of traffic it has carried since its construction. As compared with the cost of maintenance for similar types of pavements in the district, the upkeep of the travelled way on this way has been very low."

Division of Highways, took more than one million tons of material from the Doria property for use in the construction of the Interstate 15 Freeway. The photos were taken by CalNev and the U.S. Forest Service both before and after excavations. Enlarged, they show large pits left on the Doria properties after the mining.*/

In short, the evidence introduced before the ALJ during the 1973 hearing, whether or not supplemented with subsequently discovered evidence, clearly shows that the ALJ and the IBLA erred in concluding that Doria's placer claims were invalid. This conclusion becomes irrefutable when the evidence developed in the State court proceedings, showing that Schroter introduced fraudulent and defective testimony into the DOI hearing to undercut Doria's case, is taken into consideration. The post-hearing discoveries concerning the Schroter testimony totally undermine the basis of the DOI decision; they show that the decision could not have been based "on substantial evidence" and that the District Court erred in upholding it.

(ii) Contestants' Case and Its Subsequent Undermining. The State of California and CalNev in contesting the validity of Doria's claims introduced four witnesses whose testimony totalled 404 transcript pages. Of these Schroter accounted for over half, or 254 pages. Thwing, the contestants' chief expert as to marketability, accounted for 117

*/ See Doria v. Vinnell, supra, Plaintiffs Points and Authorities in Opposition to Demurrer, at p. 3 October 15, 1974.

pages; his assessment of the value of the claims and the impact of value on marketability was based exclusively on the test data compiled by Schroter (Tr. 32, 345-346, 17 IBLA 380, at 391). The testimony of the remaining two witnesses, Curtin and Hove, accounted for 22 and 18 pages respectively, or only a negligible aspect of the contestants' case. Much of Hove's testimony went to the quality of the materials, based on samples he had tested at the CHJ labs. Hove did not have the underlying test data and did not know if one of the key tests had been conducted with or without clay conglomerates. The ALJ agreed to leave Hove's test results in the record but indicated that he could not give much weight to them. (Tr. 488.)

The heavy reliance by the contestants on Schroter and the volume of his testimony is only part of the story.*/ More important is the fact that both the IBLA and the District Court based their decisions against Doria principally on Schroter's evidence. The IBLA decision gave a two-page, detailed, summary of the Schroter testimony and evidence, concluding that "The test results indicated that

*/ In addition, in its answer to the complaint in federal court, defendant, State of California, averred that the administrative decision "was supported by competent, substantial evidence adduced principally through the testimony of contestants' expert witnesses Messrs. Schroter and Thwing."

the material on the claims did not meet minimum specifications required for commercial aggregate in the industry*/ as of July 23, 1955, or for any period thereafter." The opinion also placed heavy reliance on "an extensive sand and gravel study" conducted by Schroter and concluded that there was no market for the materials. To buttress its overall decision the IBLA concluded as follows:

> "In summary, Schroter determined that the sand to gravel ratio on the claims was not in proper balance and was below minimum standards for commercial grade aggregate, the claims were at a mileage disadvantage compared to established commercial producers both in San Bernardino and Victorville, there was no proven use or production record for the materials on the claims, the established producers were adequately supplying the needs of the relevant market area with better quality material, and no other valuable minerals existed on the claims which could be produced at a profit. Based on an analysis of the foregoing factors, Schroter concluded that the deposits on the subject claims as of July 23, 1955, and up until the time of the hearing, could not have been mined, processed, removed and sold at a profit in a sand and gravel operation alone, or in a sand and gravel operation combined with production of a valuable mineral by-product.

The District Court, for its part, in its Memorandum of Decision Granting Defendants' Motion for Summary

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*/ As is more fully developed below, this is a reference to the results of the L.A. Rattler test.

Judgment (September 28, 1976), relied principally on Schroter, rejecting the Doria claims to a valid sand and gravel discovery. The court stated as follows:

> In examining the record before the court, the evidence shows that the tests conducted by the government's expert, Mr. Austin Schroter, demonstrated the invalidity of the claims under either the marketability or the "prudent man" test... The tests show that there were no valuable mineral deposits in the area of Plaintiff's claims and that the sand and gravel present in the area did not satisfy specifications required for commercial aggregate, or common variety minerals as of July 23, 1955... Plaintiff is therefore limited to discovery of non-common or valuable minerals.*/

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*/ The ALJ and the IBLA, as well as the District Court, did not place heavy reliance on Schroter for their conclusion that Doria had not made a timely discovery of feldspathic sand, a non-common variety mineral. The final decision in this regard was based on a number of elements: the fact that Billings, Doria's chief witness on the subject, had testified that he would like to conduct additional tests before giving the go-ahead for an operational plant, the fact that the samples upon which Billings conducted his tests were limited to two of the claims and the fact that, according to the District Court's reading of mining law, the contestants' interests in the property vested prior to the time when Doria actually tested and prepared to develop the material, thereby removing it from location. Doria has set forth in detail the reasons why this decision is erroneous and not supported by the record in its pleadings in the district court and will not address the issue here. (See Doria's Opposition to Defendants' Motion for Summary Judgment, July 30, 1975, as well as Doria's May 26, 1976 Supplemental Reply to Defendants, December 10, 1975, Request..., which are incorporated herein by reference).

Because of the centrality of Schroter's testimony to the decision in this case, it is important to examine the assertions that he made on the hearing record.

Photographic and testimonial evidence produced by Schroter suggested that the sampling procedures that he follo on the Doria claims involved: the taking of a 10-12 foot deep back hoe cut of material (each approximately one ton) from each claim, the coning and quartering of each cut, followed by a second quartering to produce appropriate samples. Schroter never testified concerning the exact weight of each sample, but, by implication, each quarter weighed around 125 pounds. One of the quarters from each claim was screened and weighed on the ground to determine the sand/gravel ratio; one was submitted to the state testing laboratory for testing; one was retained for examination for precious metals and one was reserved as a "spare" for examination by any interested party. (Tr. 127-134.)

Schroter testified that he performed or had performed a series of three tests on the material including one to determine the sand/gravel ratio (he implied that two sets of sand/gravel ratio tests were performed, one in the field and one in the lab); one to determine the resistance of the material to abrasion (known as the L.A. Rattler test); and a test known as the "sand equivalent" test, intended to measure the amount of silt in the clay. (Tr. 135-136.

Schroter also described how the tests were performed and what standards the material had to meet to conform with both public and industry requirements. Apart from the tests that he conducted in the field, Schroter indicated that the bulk of the testing program was performed by the state testing lab. The performance of this lab as well as the requirements of each of the tests that it performed are regulated in detail by the State of California.

The results of all of Schroter's testing, whether performed directly by himself or by the laboratory, were presented in Contestants' Exhibit 14A (Tr. 139, Enclosure 4, attached hereto), which became the key exhibit for destroying Doria's claims. Based on Exhibit 14A, Schroter testified that, for the most part, the test results showed that the Doria claims did not meet minimum public and/or industry standards and, hence, were valueless.*/ (Tr. 139-140, 142). He concluded that for the period 1955 through the time of the hearing, "none of the samples passed, none of them at commercial standards of profitability, possible profitability." (Tr. 143.) These results were directly contradicted by the

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*/ Exhibit 14A, for example, shows the average sand/gravel ratio for the Doria claims to be 75/25, significantly higher in terms of sand content than the standard asserted by Schroter to be acceptable in the industry. Similarly, the Schroter results for the L.A. Rattler test averaged 56% loss at 500 revolutions, or roughly 6-14 percentage points above the 45-50% established by the ASTM. Doria's own test results in both instances showed that the materials conformed with industry standards.

Schroter's final conclusions were that, in his opinion, the Doria properties did not contain deposits "of interest to man in some commercial or industrial use" (Tr. 226) because there was no way to show a profit (Tr. 227). According to Schroter, a prudent man would not invest any additional funds in the development of the claims (Tr. 227-228).

The portion of Schroter's testimony carrying the most weight with the decision makers was that dealing with the quality of the Doria material. Although he also presented damaging testimony concerning the marketability of the material, his conclusions in that regard were derivative. In essence, Schroter testified that the materials were unmarketable because they were inferior.

Subsequent to the completion of the DOI hearing and the IBLA's review thereof, Schroter's testimony and the test data he produced have been shown to be totally inaccurate and/or fraudulent. Underlying evidence has been lost; the individuals involved in the testing program have repeatedly contradicted each other and newly discovered evidence has shown that the tests whose results were the exclusive basis for Schroter's testimony were so improperly performed as to require rejection of the results. In putting

forward such evidence, the State and CalNev worked a hardship upon an innocent private party and undermined the integrity of the administrative and judicial processes. For these reasons, a new hearing is required.

It was impossible for Doria to uncover the fraudulent nature of Schroter's testimony, particularly the test results, at the time of the hearing. The evidence he introduced was ostensibly validated by a state testing facility and there was no reason for Doria to doubt the integrity of that facility. In fact, Doria was able to unravel the shrouds concealing Schroter's conduct -- and that of the state materials testing laboratory -- only through the arduous, time-consuming and extensive discovery proceedings conducted in the state court litigation. The further that litigation has progressed, the more extensive has become the evidence of Schroter's duplicity.

The following is a summary of the key defects that Doria has uncovered in the Schroter testimony. It is necessarily technical and complicated, but there is no other way to establish the clear-cut grounds for reversal in this case.

(a) Improper Sampling of Materials

As noted above, Schroter's testimony during the course of the administrative hearing established that the

samples removed from the Doria claims for testing were extracted as follows:

- Backhoe cuts were made on the subject mining claims to a depth of 10 to 12 feet; materials from the cuts weighing approximately one ton were placed on a slick sheet and coned and quartered; each quarter was again cut in four.

- Approximately six inches to two feet of the 12-foot cuts consisted of an overburden containing significiant amounts of cobbles (Tr. 240-244).*/

- After coning and quartering the samples taken from the 10 to 12 foot cuts, each quarter was split into four equal parts for testing. One-quarter was designated for a sand and gravel ratio test in the field; one-quarter was designated for a noble mineral assay test; one-quarter for concrete aggregate testing in the state testing laboratory; and one-quarter was retained as a spare or hold sample for Doria or others to see and examine themselves. Mr. Schroter implied that each of individual samples ultimately sent to the State Lab for testing weighed roughly 125 pounds (2,000 pounds equals one ton, divided by four equals 500, divided equally into four parts equals 125 pounds) and each was of approximately the same composition and weight.

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*/ In support of this observation Mr. Schroter submitted numerous photographs in evidence showing a veneer of cobbles and boulders.

This testimony has subsequently been shown to be false. The samples were neither of the composition nor weight attested by Schroter. In the first place, the samples actually put through for testing included significantly fewer rock materials than are found in the tupical mix of materials located on the Doria claims. Schroter's testimony that approximately six inches to two feet of the 12-foot cuts contained an overburden that included significant amounts of cobbles was substantiated by numerous photographs and by his deposition testimony taken on May 16, 1975, wherein he indicated the existence of rocks "at least as large as cantaloupes." (Schroter Deposition, May 16, 1975, p. 101.) However, the test sheets maintained by the State Laboratory (see Enclosure 5) indicate in the upper lefthand section sheets, marked grading analysis, that only two samples had rocks as large as four inches; three others had rocks as large as three inches, and an additional sample included 2.3 inch material. In other words, less than half the samples included rock material.*/ As is more clearly demonstrated below, the absence of a representative level of rocks and boulders in the testing samples violated the test standards and rendered the entire procedure invalid.

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*/ This is hard to explain, given the repeated testimony of Schroter and others that the claims all included relatively homogenous material.

Secondly, the Schroter samples were all deficient in weight. At this stage in the proceedings, it is impossible to determine the true weights of the samples. Not only did Schroter "lose" his field notes, recording the sample weights (Schroter Deposition, March 6, 1977, pp. 10-11), but the State Laboratory destroyed that portion of the test sheet maintained on each sample that recorded the weight at time of testing (Claude Dean Pitts Deposition, April 23, 1976, pp. 50-53, Exhibit 5). Although the lab maintained a single sheet on each sample, with the weight recorded in designated columns on the back of the sheet, for some inexplicable reason, the original sheets were destroyed and only a xerox of the front portion of each sheet was maintained. Thus, there are no original records of the sample weights. This situation is compounded by the fact that Schroter, the lab technicians and others have testified under oath to such a variance of weights for the samples, that it is only possible to conjecture as to their true weights.

For example, at the DOI hearing, Schroter implied that each sample weighed 125 pounds. But in his May 16, 1975 deposition, he estimated that each sample varied in weight from 20 to 50 pounds. (Schroter Deposition, May 15, 1975, p. 81.) One year later, he again changed his testimony. In his affidavit of April 29, 1976 (Enclosure 6) Schroter stated that the weight of his samples ranged from 31 t 208 pounds, and "averaged 135 pounds a piece." Sainte-Claire,

the only man at the State Laboratory to test the samples, stated that the approximate weight of nine of the samples was only 20 to 25 pounds, and the remaining nine samples were only a little heavier than the first group. (Sainte-Claire Deposition, September 10, 1976, p. 49, 51-52.) Claude Dean Pitts, Sainte-Claire's supervisor, testified in April 1976 to weights ranging from 5.9 pounds to 45.5 pounds. (Affidavit of Robert Vidor, May 18, 1976 attaching list A sample weights from Pitts -- Enclosure 7) Finally, laboratory director Rundle testified to Schroter samples taken from Doria's "Mesquite" placer claim, that weighed only 10 to 18 pounds. According to Rundle, these samples were typical of all the others since all of the samples were supposed to be uniform. (Rundle Deposition, August 22, 1975 , pp. 9, 12, 15, 51, and 67.) In addition, belated testimony was introduced by Thomas DeVore, suggesting that the mixed sand and gravel samples taken from each claim were supplemented by additional bags containing only rock material from each claim. This testimony was contradicted by Schroter.

Despite the highly conflicting testimony and the fact that the original records reflecting the actual sample weights have been lost or destroyed, testimony on the record (in both the federal litigation and the state court cases) strongly suggests a pers sample weight of around 15-20 pounds, a clear violation of state law. The testimony supporting this conclusion is as follows:

At the administrative hearing R-4873 of April 26, 1973, Schroter introduced Exhibit 14A (Enclosure No. 4). Table 5 of that exhibit indicates the range of the sand to gravel ratio test results which Schroter observed at the time of the sampling of the claims in the field, and also the range of sand to gravel ratio results that were compiled by the State Lab and interpreted by them for him. The approximate average of the sand and gravel test results from Table 5 of Exhibit 14A is 75% sand to 25% gravel (note that the exclusion of cobbles and boulders from the samples alone should have disqualified the sand and gravel results obtained by Mr. Schroter). These averages applied to all of the samples since the samples were relatively homogenous.*/ They indicate that no samples were taken that consisted solely of rock material.

At his deposition of April 23, 1976, Claude Dean Pitts compiled the weights of each sample, then in the custody of the District 08 Lab in San Bernardino. This compilation was marked as Exhibit 4 for the purposes of that deposition (Enclosure 7 - see attachment). The range of weights of the samples recorded in Enclosure 7 is from 5.9 pounds to 45.5 pounds; all of the samples weighing over 40 pounds are designated as +4 materials only (and the remaining

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*/ Schroter testified that all four parts were roughly equal. Charles Russell Sainte-Claire, the tester of the materials, indicated that the weights of the two samples from each claim (test and spare samples) weighed approximately the same for each of the claims. And Thomas Rundle also testified that if samples are coned and quartered into four equal parts, they must all be about the same size and weight.

designated sd. and rock). However, Sainte-Claire, the individual who tested the material, indicated that he never received or observed samples from Schroter which contained only +4 mesh or gravel material. This suggests that the heaviest sample tested actually weighed only 34 pounds, making the average weight per sample approximately 14.2 pounds. Sainte-Claire later indicated that for samples No. 4-72-90 through 4-72-98 the approximate per sample weight was 20 to 25 pounds, while for samples 4-72-103 through 4-72-111 the per sample weight was a litter heavier but still too small for testing (Sainte-Claire Deposition, September 10, 1976).

These weight assessments are further confirmed by Mr. Robert W. Vidor's letter of October 24, 1975, setting forth the weights of the samples Mr. Rundle brought to his August deposition (Enclosure No. 8). The Vidor letter indicates the range of weight of the Rundle samples to be from 12.7 pounds to 25 pounds. These weights refer to the samples brought by Mr. Rundle to his August 22, 1975 deposition from the Mesquite claim.*/

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*/ Note that the data contained on test sheet No. 162 (the +4 mesh sample from the Mesquite claim showing a sample weight of 98.75) does not correspond to the weights indicated in Mr. Vidor's letter of August 22, 1975, Enclosure No. 7.

In short, the only way that the sample weights can be measured in excess of 25 pounds is if an entire set (one per claim) of samples containing only rock material (+4 mesh) is included; this device for upgrading the sample weights cannot be accepted, because Schroter denied ever taking such samples. The use of +4 mesh materials to supplement the sample weight appears to have been an afterthought, a step undoubtedly taken as a result of questions raised in the state and federal litigation suggesting that the testing program was invalid. The mysterious rock samples were first mentioned by Thomas DeVore, Schroter's associate in the field. DeVore suggested that a fifth sample was taken from each claim that contained material of a weight of 100 pounds (DeVore Deposition, June 4, 1976). This testimony was specifically contradicted by Schroter, Sainte-Claire, and Rundle and by DeVore's own prior testimony in the same deposition. Further, it flies in the face of the repeated testimony that 4 samples were taken from each claim and that each of these samples was roughly homogenous both in content and in weight. It should be disregarded for purposes of determining actual sample weights.*/

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*/ The contradictions concerning sample weights are not the only contradictions in the case. Schroter has even contradicted his own testimony concerning the method of sampling that he utilized. In his affidavit of April 29, 1976, filed in federal court (Enclosure 6) Schroter indicates that instead of being coned and quartered, the samples were decimated. Decimination, according to Schroter, is defined as taking one shovel full of material for waste and a second shovel full for the sample (Schroter Deposition, May 16, 1975, pp. 86, 87 and 88).

The deficiencies in the sample weights invalidate the tests performed on the samples, thereby undercutting all of Schroter's testimony concerning the quality of the materials. Worse, the deficiencies appear to have been deliberate and informed, rather than the result of inadvertence or misunderstanding. Not only was Schroter experienced in performing the kinds of sampling and testing involved and familiar with state lab requirements, but, in addition, he was specifically warned that the samples must meet specific weight requirements. Sainte-Claire testified on September 10, 1976, at pages 15-23 of his deposition, that prior to Schroter's sampling in the field, a meeting was set up with Mr. Schroter, Mr. Rundle, Mr. Pitts, and possibly Mr. Vidor present, wherein Sainte-Claire advised Schroter that for proper testing each of the samples must contain 40 to 50 pounds of rock, or +4 mesh material. At a later deposition Sainte-Claire indicated that he had advised Schroter that for samples containing 75% sand and 25% gravel, proper testing would require a total per sample weight of at least 160 to 200 pounds. This would be necessary to test 40 to 50 pounds of rock for the L.A. Rattler test. Schroter totally ignored Sainte-Claire's advice.

Given the deficiencies in the samples taken by Schroter from the Doria claims, there is no way that the tests performed on the samples could be valid or of any use in determining the quality of the materials on the

claims. The following discussion of problems associated with the testing procedures helps to illustrate this point.

(b) Improper Testing of Materials

• The Sand/Gravel Ratio Test:

Schroter testified and introduced test results in Exhibit 14A allegedly showing that the Doria materials contain too much sand in relation to their gravel content to be marketable. The figures introduced into Exhibit 14A showed an average sand/gravel ratio of 75%-25% for the claims in question. If the figures are correct, this means that the composition of the materials on each claim averaged 75% sand and 25% gravel, a percentage that Schroter claimed made the materials inappropriate for use by either the state or private commercial operations, because of the high sand content. Neither Schroter's figures nor his conclusions are correct.

In the first place, the standard asserted by Schroter, and apparently accepted by the ALJ, is not supported by the evidence. Sand and gravel having an even lesser percentage of gravel is commercially marketable; the major purpose of tests similar to the ones allegedly conducted by Schroter is not to determine marketability but rather to form a basis for decisions concerning the processing procedures required to make the materials

marketable. In the second place, Schroter performed the tests in a fashion that did not conform with state law and that consequently produced meaningless results. Had state law been adhered to, the sand/gravel ratio would have been closer to that produced by the Hazen report performed for Doria and introduced into evidence by it during the administrative hearing. That report showed the true sand/gravel ratio of the Doria materials to be 60/40 (60% sand and 40% gravel).

The only official test relevant to the determination of the sand and gravel content in claims such as Doria's is state test 202-G, a coarse and fine sieve analysis test (Enclsoure 9). The results of this test, which was actually performed by the state lab won the Doria materials, showed the materials to be substantially as determined by the Hazen report (see Enclosure 2). The test results reported by Schroter in the first two columns of Exhibit 14A either did not meet the requirements of 202-G, or may not have actually been performed. Thomas Rundle, the supervisor of the state lab, testified that he had never heard of a test similar to Schroter's "field" test. When questioned concerning this test, Rundle testified as follows:

> Q. "Do you know what a sand and gravel ratio test is?"
>
> A. "No, I described the sieve analysis test (202-G). Now, I am trying to say what I think sand and gravel ratio is, which we don't use in our business."

At page 46 of the same deposition:

Q. "I believe we talked a little bit about the sand and gravel ratio test and you weren't familiar with it by that name; is that correct?"

A. "No, I don't ... I have heard of such a test. I am not sure there is such a test."

Regardless of whether the sand/gravel tests performed by Schroter in the field were known in the industry, they were improperly performed. The basic defect was the inclusion in the sand of materials not generally regarded as sand, that is, waste materials and materials that would pass through a 200 mesh sieve. By including these materials, Schroter produced a distorted sand/gravel ratio that reflected an excessive percentage of sand. The inclusion of these materials violated industry standards as established by the American Society of Testing and Materials (ASTM). The ASTM standards specify that for similar or related tests, particles that fall below the minus 200 mesh sieve are not to be considered part of the sand product and should be eliminated from any sand measurements. (See, Mineral Commodities of California, Bulletin 176, dated December, 1957, pp. 495, 501, Enclosure 10).

The results of the tests reportedly performed in the lab to determine the relative sand/gravel content of the materials (reported in Column 2) cannot

be explained. They differ from the results of the 202-G test reported on the test sheets (which were not made available until some time after the DOI hearing when they were discovered as part of the state court litigation). These results appear to have been fabricated by Schroter as a means of substantiating his field test results.*/ In any event, whatever their derivation, the results represented by Schroter in regard to sand/gravel ratios are incorrect and misleading.

● The L.A. Rattler Test

The L.A. Rattler test, designated by state regulation as Test 211-D, is a test to determine the amount and degree of abrasion of certain aggregate sizes, which relates to their suitability for concrete aggregate or high grade products. According to Schroter, an appropriate test result for commerical purposes (as determined by ASTM) is 50% loss at 500 revolutions. For asphaltic concrete,

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*/ It should be noted that to properly perform the 202-G test, state regulations provide that if a sample submitted for testing contains particles of two and one-half inches in size -- as did many of the Schroter samples (see Test Sheets Nos. 4-72-95, 4-72-97, 4-72-103, 4-72-107 and 5-72-160) -- it must include 55 pounds of rock (or 25,000 grams). For material that is 75% sand and 25% gravel (as Schroter claimed Doria's is), the total sample weight must be 220 pounds (Pitts Deposition, April 23, 1976, p. 79-80). The test sheets reveal that none of the samples weighed 55 pounds, much less 220 pounds.

the requirements are 10% loss at 100 revolutions and 45% loss at 500 revolutions. The Hazen Report introduced by Doria into evidence at the DOI hearing rated the Doria materials (when properly processed) as between 41.3 and 45.5%, fully within the ASTM standards (Tr. 1205).*/ The Schroter test result , on the other hand, as reflected in Exhibit 14A showed an average of 56%, somewhat out of line with industry standards.

The ALJ placed heavy reliance on the L.A. Rattler test results in reaching the conclusion that the Doria materials were not of sufficient quality to be marketable. This reliance was misguided. As subsequent discovery has uncovered, the size of the samples put through the L.A. Rattler test were deficient both in content (cobbles and boulders were not included) and in weight.

Enclosure No. 11 describes the test methodology for the L.A. Rattler test.**/ A "charge or feed of 11 pounds (2.75 pounds for each of the range of four sizes indicated) is placed in the L.A. Rattler machine to determin

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*/ Myertons, Doria's expert, commented on the results as follows: "I would interpret this as indicating it has passed the test on both counts (state and ASTM specifications)." (Tr. 1211.)

**/ The aggregate sizes included in the test are: those materials passing the 1-1/2 inch and retained on the 1 inch sieves; those materials passing the 1 inch, and retained on the 3/4 inch sieves; those materials passing the 3/4 inch and retained on the 1/2 inch sieve and those materials passing the 1/2 inch and retained o the 3/8 inch sieves.

the resistance of coarse aggregate to impact in a rotating cylinder containing metallic spheres. The resultant "percentage of wear" is arrived at by dividing the weight of the original test specimen minus the weight retained on the No. 12 sieve after the specified number of revolutions by the original weight.

The weights required for samples to be subjected to the L.A. Rattler test are listed in California Test Method 202-G (Enclosure 9), which specifies the procedures for determining the particle size distribution of fine and coarse aggregate (See Enclosure 9). Table No. 1 of 202-G specifies the minimum sample weight necessary for any coarse aggregate material submitted for testing. If the sample submitted for the L.A. Rattler test has individual particles in it of up to 2-1/2 inches, then 25,000 grams or 55 pounds of +4 mesh materials must be introduced prior to producing the 11 pound "charge" necessary for the L.A. Rattler test. This means that in regard to samples with a 75/25 sand to gravel ration, there must be at least 55 pounds of rock or +4 mesh material, for a total sample weight of 220 pounds.

From the testimony previously discussed above, and from a close perusal of the 23 test sheets obtained in the state court proceedings (Enclosure No. 5), it is evident that the State of California violated its own testing procedures in the conduct of the L.A. Rattler test. This Memorandum has previously shown that the individual samples taken to the lab

for testing averaged around twenty pounds each. This means that even those samples that contained no material of 2.5 mesh or more were underweight. The samples that did contain such materials (as is indicated on a number of the test sheets) were ten times too small in terms of weight.

Testimony has been taken since the DOI hearing suggesting that in order to correct the weight deficiencies, the test samples were combined into two sets of nine each and that these in turn may have been combined into a single big sample for testing (Sainte-Claire Deposition, September 10, 1976) but this testimony has been so contradicted as to be unbelievable.*/

The conflicting testimony is as follows: Sainte-Claire stated that he was told by his supervisors to composite the individual samples numbered 4-72-90 through 4-72-98 because they were too small to meet the test standards (Sainte-Claire Deposition, September 10, 1976). He subsequently reported back to his supervisors that even after compositing the nine samples there was insufficient material to meet the state standards. He was then instructed to correct this deficiency by throwing

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*/ The test sheets themselves reflect that two samples were created for testing by compositing nine of the Doria samples for each of the two. This, according to the Pitts Deposition, was written by him on the test sheets, although he had no knowledge of the compositing. Sainte-Claire, on the other hand, testified that he tested some individual samples plus combinations that resulted from compositing three samples and then joining them with "hold" or "spare" samples. There is no way of getting under this conflict, but it is clear that, regardless of what testimony is accepted, the tests were inadequate because the samples tested did not have sufficient rocks and cobbles and because they were deficient in weight.

in all of the "hold" samples, thereby effectively doubling the weight of the samples brought by Schroter to the lab for testing.

The suggesting that the spare samples were combined with the hold samples is contradicted by a range of testimony: by the representations in Exhibit 14A that one group of six samples was composited (Buckshot, Rattler, Clearview, Lizard Gulch, Buster and Mesquite) and another group of four samples (Sunshine, Hawk, Baldy and Harbor); by Schroter's testimony at the Administrative Hearing that the hold or spare samples were never tested; by Vidor's affidavit of May 18, 1976 asserting that no tests had ever been run on the spare samples and that they remained intact (Enclosure No. 7); by the deposition of Claude Dean Pitts to the effect that the spare samples were still retained by the lab (May 19, 1976, p. 68) and by the notations on the test sheets themselves, which indicate that two sets of nine samples were composited for testing but make no reference to inclusion of the hold samples.*/ It seems clear that only test samples were combined, but even with this belated effort to compensate for the samples' inadequacies, they continued to violate the requirements imposed by the state for the L.A. Rattler test. Given the presence of materials exceeding 2.5 pounds, in several of the

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*/ Sainte-Claire's suggestion that all of the test and hold samples were combined is further thrown into question by the results recorded on the test sheets. Instead of showing the same test results (which would flow from a single test of combined samples), they reflect a number of different L.A. Rattler test results.

samples, the overall sample weights remained deficient.*/

In any event, the main significance of the testimony concerning combining and compositing of samples is twofold: it indicates that contestants were aware that their sample wieghts were too small, given the presence of rock materials, to comply with the testing regulations established by the State of California; that they attempted, improperly, to cover up this deficiency; and that, in the process of the coverup they repeatedly contradicted themselves, thereby throwing into question the probity of all of the evidence and testimony pertaining to the Schroter testing program.**/

Mr. Schroter, the contestants' chief witness, testified during deposition that all of his testimony and conclusions were based on his sampling and test results. (Schroter Deposition, April 7, 1975, p. 25). This was confirmed by the State's attorney, Mr. Vidor, who stated during the DOI hearing that the expert witnesses were basing their testimony

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*/ It should be noted that at the time of the administrative hearing, there was no way that Doria could challenge the L.A. Rattler tests introduced by Schroter. Only the test results were listed, with no divulgence of the test sheets themselves. Further, because the results were stated to be the end product of tests performed by a state laboratory (see Enclosure 3, Item 5, on page 2), there was a presumption of validity.

**/ It should be noted that if, in fact, the samples were composited, this was a violation of the California regulations which call for separate per sample procedure for each of the tests numbered 202, 211 and 217.

entirely on the sampling and test results (Tr. 105). Once the testing results are removed from the record, contestants have no case and, equally important, there is no "substantial evidence" upon which the ALJ or IBLA decisions can be based.

The discussion in the previous pages establishes beyond question that the testing and sampling conducted by Mr. Schroter and the state testing lab was fraudulent and deficient. Despite the fact that he was warned that his sample weights were too small to conform to state standards, Schroter took no steps to correct the situation. He persisted in having the state test samples that were deficient both in content (no boulders or rock) and size (not heavy enough to meet state standards). The result was defective testing. Recognizing the deficiencies in the testing, both Schroter and the lab attempted to cover their tracks by a variety of efforts that are reflected in severe contradictions in the sworn testimony taken in the various state court proceedings that have been instigated by Doria to vindicate its rights. These contradictions include: discrepancies between the data recorded in Exhibit 14A and that recorded on the xerox copies of the test sheets maintained by the lab; conflicing statements concerning separate samples of rock that may or may not have been taken from each claim to correct the non-representative nature of the original samples; belated stories of compositing some or all of the samples to

increase their bulk to the level required for the state prescribed tests and endless contradictions concerning the sample weights. In attempting to cover up their faulty sampling and testing program, Schroter and the state testing lab officials have produced a web of lies that strongly supports Doria's position that the entire testing program must be disregarded.

(c) False or Inaccurate Testimony Concerning Marketability

As noted above, besides his testimony concerning the sampling and testing of the material on the Doria claims, Schroter also gave testimony to the effect that the materials were unmarketable. This testimony was given significant weight by the IBLA, which concluded: "the claims were at a mileage disadvantage compared to established commerical producers both in San Bernardino and Victorville ....the established producers were adequately supplying the needs of the relevant market area with better quality material."

The evidence discovered subsequent to the hearing which is discussed above undermines totally any conclusions concerning the quality of the material that the administrative and judicial tribunals may have derived from Schroter's testimony. The following discussion shows that Schroter's statements concerning marketability are similarly vulnerable.

Schroter testified during the DOI hearing that he made an extensive marketability study,*/ including interviews with potential users of the Doria materials and that this study clearly demonstrated that the materials could not be sold. The reliability of this study has already been thrown into question by Schroter's statements that he didn't estimate economic trucking distances because the materials were worthless and that he didn't know where Barstow was located vis-a-vis Victorville, a major marketing area for sand and gravel (see p. 27 above). Further, Schroter stated unequivocally that the materials were not and could not have been used for the construction of two interstate highway projects constructed near the claims during 1930-32 and 1968-70; this also has been subsequently shown to be false.

In regard to the highway projects, California Highway Engineer Material Report of 1951 (see p. 27 above) indicates that materials from the Doria placers were used to build the 1930-32 freeway and that, even with the heavy traffic over the route, the materials stood up well with low maintenance

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*/ The fact that contestants undertook a marketability study at all strongly suggests that they knew the Doria materials to be valuable. If, in fact, the testing program had shown the materials to be valueless, it would have been unnecessary to even introduce evidence concerning the availability of markets. Further, it is questionable whether Schroter was equipped to perform this study. At his deposition of May 19, 1975 Schroter stated that his expertise did not extend to the production and marketing of sand and gravel aggregates for concrete or other sand and gravel products.

costs. Similarly, as noted on p.20, it has been disclosed since the DOI hearing that the Vinnel Corporation, a sub-contractor of the state of California, produced highgrade products from the Doria claims to build portions of the Interstate 15 freeway constructed in the late '60's.

Besides these substantial public markets, there were more than adequate private markets for the Doria materials from the date of their discovery to the date of the trespass and mining of the deposits for the Interstate 15 freeway. Among the facts introduced into evidence that support this conclusion are the following: (See Enclosure No. 12 for a graphic representation of the location of each of the deposits discussed, in relation to the Victorville market. The numbers designated below correspond to locations on that map.)

Barstow suppliers (5) sold to Victorville markets (1) throughout the period in question; this was demonstrated by Barstow operators and by their customers. Barstow was a major supplier despite the fact that the Oro Grande despoit (4), operated by contestants' witness Thwing, had a distinct haulage advantage (the latters was only six miles north of Victorville, while Barstow was 31 miles north of the city).*/ There is a strong inference that if Barstow could serve this market, Doria (2) certainly could have as well, because its deposits were only 16 miles from the city.

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*/ Thwing's testimony concerning the ability of Oro Grande to meet Victorville needs is somewhat shaky, given the fact thatSchroter testified (T. 94-95) that the Oro Grande Valley consists of worthless fanglomerates.

A major market in Victorville was that represented by Mr. Hove. Hove operated a cement batch plant just outside of Victorville (3) and also purchased sand and gravel for other uses. Hove testified that he purchased sand-gravel aggregates from Thwing's Oro Grande deposit (4) from about 1955 to 1967 for his cement batch plant at Hesperia. Thwing testified that the Oro Grande deposit was depleted in 1967, and that, thereafter, he moved the plant to Pearblossom, some 30 miles from Victorville, where he operated it until around 1971 or 1972. He claimed that he had to close down Pearblossom because of a lack of Victorville markets. This conclusion, hoever, was thrown into question by Hove, who stated that during the period 1967 to 1972, he purchased his aggregates from Lancaster and Palmdale (8), about 50-55 miles outside of Victorville. Around June 1972, Hove placed into production a sand-gravel deposit in Lucerne Valley (6), a deposit about 24-25 miles from Victorville that he had acquired around 1955. In short, Hove's testimony contradicts Thwing's and makes it clear that continuing markets existed in Victorville for sand and gravel materials, even if they could only be obtained at a haulage distance of anywhere from 25 to 50 miles. (While these deposits were being marketed, the Barstow plants remained in operation, indicating a demand for multiple sources of sand and gravel, despite the considerable distances of the sources from Victorville).

Statements made by Thwing corroborate the fact that the Victorville consumers were willing to and did go to distances considerably beyond the Doria locations to obtain sand and

gravel. Thwing, at his deposition of October 13, 1977, testified that despite its location 31 miles from Victorville, Barstow was supplying the Victorville markets prior to 1937 when he first got into the business. Similarly, Lytle Creek, located 40 to 45 miles from Victorville, also supplied the area prior to 1937. At the conclusion of the same deposition, Thwing asserted that both Barstow and Lytle Creek are still supplying Victorville.

The above testimony strongly suggests that given the quality of the Doria materials (as established by the evidence introduced by Doria), they could readily have been marketed in Victorville and, in fact, would have had a distinct haulage advantage over suppliers upon which the area relied throughout the period 1955 to 1973.

3. Conclusion:

The above discussion makes it abundantly clear that the evidence introduced by the contestants in validity contest R-4873 and relied upon by the ALJ, the IBLA and the District Court, was seriously tainted. The testimony concerning the quality of the materials located on the Doria properties -- which served as the keystone of the administrative and judicial decisions -- was based on sampling and testing procedures that were conducted in such a fashion as to violate the laws and regulations of the State of California.

In fact, the procedures were so defective as to render the test results useless as a tool for assessing the Doria materials. Not only were the samples taken from the Doria properties unrepresentative in content, but they were also of insufficient weight to meet the test requirements. The tests themselves were improperly performed, compounding the errors surrounding the sampling process. The efforts of the state testing lab and the contestants' chief witness to explain these deficiencies subsequent to the hearing in R-4873 have been so full of contradictions and false statements as to create a strong inference that they are involved in a "cover-up."*/

Finally, although the question of the marketability of the materials was never given very serious attention by the decision-makers (the materials were largely assumed to be unmarketable because of their alleged low quality), the evidence introduced by contestants concerning marketability has also been demonstrated to be incorrect and inaccurate. The most striking example of this pertains to the public highway market during the period in question; Doria has

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*/ There is no other way to explain the loss of Schroter's field notes, the destruction of the state lab's test sheets recording the sample weights, the belated, unexplained and unsubstantiated appearance of a whole new set of samples containing rock material only from each claim, the conflicting statements concerning the compositing or combining of various samples for the L.A. Rattler test -- and a host of other discrepancies.

demonstrated that the State of California actually made use of vast quantities of its materials for the construction of Interstate 15; in fact, the state's intention to use the materials for that purpose in large part explains its use of dishonest and fraudulent means to support its case in the validity contest. In addition to the public market, Doria has also demonstrated that significant demand existed for its materials in the private market, particularly in the Victorville area; during the period in question suppliers located at considerably greater distances from Victorville than Doria had no difficulty selling their sand and gravel in that market.

The unfairness and deception practiced by contestants on Doria during R-4873 in themselves justify a new hearing. Absent the tainted testimony, there is no "substantial evidence" to support the ALJ, the IBLA or the District Court decisions. This conclusion that a new hearing is required is buttressed by the fact that Doria has performed in good faith since its discovery of the placer claims and came into the validity contest with "clean hands." The original owners repeatedly attempted to bring the claims to the point where they would be ready for processing. Through their lack of experience and knowledge, they initially failed in these efforts, but

they were moving to production when these proceedings were initiated. At no time were the Doria principals engaged in the use of federal lands for improper purposes (as has often been the case where claims are declared invalid); their unquestioned intent was, and continues to be, to develop the claims to full marketability.

In presenting its case in R-4873, Doria demonstrated that its materials were of sufficient quality to justify processing and distribution of a number of marketable materials, including feldspathic sand, mica, magnetic, fine aggregate and coarse aggregate. In fact, the Doria principals are prepared to begin processing immediately and to invest substantial amounts of money in the mining operations.

The materials located on the Doria claims have not changed or altered significantly during the years the validity contest and the appeal therefrom have been pending. This is not a case where it can be properly argued that, although there is strong evidence of fraud and collusion, circumstances have so changed since the acts complained of as to make a rehearing impracticable. On the contrary, the acts of fraud perpetrated on Doria, combined with the fact that it is a simple and uncomplicated matter to collect and present new evidence on the value of the claims, mandate a rehearing of the case.

For the above reasons, Doria, through the undersigned counsel, respectfully requests Secretary of the Interior Andrus to agree to a rehearing in this case, which proceeding will commence as soon as Doria has taken the necessary steps to have its appeal stayed or dismissed in federal court.

Respectfully submitted,

Sarah C Carey

Sarah C. Carey
Larry A. Sackey

May 5, 1978

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1150

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation and CALNEV PIPE-LINE COMPANY, a Corporation,

Petitioners,

vs.

DORIA MINING AND ENGINEERING CORPORATION, a Corporation, CECIL D. ANDRUS, etc., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY MEMORANDUM.

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PETITIONERS' REPLY MEMORANDUM.

Preliminary Statement.

Respondent Doria's attempt to obtain in the district court a *de novo* trial of the administrative hearing under the guise of fraud and perjury is well shown by the thrust of its Opposition to the Petition herein. In implementation of such attempt Doria sets forth matters outside the administrative record, and matters irrelevant to Doria's charges of fraud and perjury in the mining contest allegedly adduced from Schroter's testimony. For example, at page 3 of its brief, Doria alleges discovery of the purported mining of one million

tons of road-building material from the claims by the State's contractor for the construction of Interstate 15, as shown by certain aerial photographs. Doria fails to explain what the material was actually used for, or how estimates of tonnage could be made from examination of aerial photographs.[1]

Unaccountably, Doria attaches as an Appendix to its brief the Petition dated May 5, 1978 presented by Doria to the Secretary of Interior for a rehearing of the validity contest. This Petition was presented while the appeal was pending before the Ninth Circuit Court of Appeals. Said Petition was not part of the record in the District Court, nor in the validity contest. It presents matters well beyond the alleged fraud and perjury urged in the District Court. It reargues the merits of Doria's case in the contest proceeding; it reargues the weight and credibility of evidence adduced before the Administrative Law Judge and reviewed by the IBLA. As such, it is the administrative counterpart of a motion for new trial. Being wholly outside the record on appeal, it merits no consideration by this Court.

I

Only the Test Results Shown in Exhibit 14-A Were Challenged by Doria, and Not Petitioners' Testimony as a Whole.

In reply to Petitioners' contention that the alleged fraud involved only the test results on samples taken by Mr. Schroter, Doria asks at page 5 of its brief

[1]A motion to reopen the validity contest was in fact made by Doria on the ground of new discovery of this information but, as indicated in the IBLA opinion, was denied as irrelevant to showing continuous marketability of materials, even if true. See Petition, App. "C," pp. 39-40.

". . . who is to say that the whole raft of evidence which petitioner claims 'as a whole reveals no discovery of valuable minerals' was not also tainted by fraud or perjury?" The answer is that Doria in the district court focused its attack only on Schroter's testimony regarding the test results as tabulated in Exhibit 14-A, and the laboratory test sheets on which said Exhibit was based.

The Ninth Circuit Court of Appeals indeed held that the merits of Doria's motion to amend its Complaint should be considered by the district court. However, Doria's motion to amend was predicated only on the alleged fraudulent nature of Schroter's testimony in connection with Exhibit 14-A. In the Points and Authorities attached to Doria's motion to amend, it was pointed out that Doria obtained "for the first time" copies of the laboratory test sheets and that:

> "Upon a review of these test sheets plaintiff has become aware, for the first time, and it has become apparent, that the exhibits placed into evidence by the defendants at the department hearing, which allegedly set forth the test results obtained by the State laboratory substantially vary and differ from the actual test sheets prepared by the State laboratory. In addition the test results, as set forth on such exhibits, materially distort the test result found and findings made by the State laboratory." (Points and Authorities in Support of Notice of Motion and Motion for Leave to Amend Complaint, CR 364, lines 15-30.)

The affidavit of James M. Muir, filed in support of the motion, also specified the laboratory test sheets as the basis of uncovering the alleged fraud in reporting the test results. (CR 369-371.)

From the foregoing it is evident that Doria's attack was limited to a specific item of evidence and testimony relating thereto, and not to a "whole raft of evidence" presented at the administrative hearing. Petitioners reiterate that the body of evidence, reviewed in detail in the IBLA decision, is sound and unaffected by the alleged "cancer" of Exhibit 14-A.

II

Doria Reargues the Weight of Evidence at the Contest Hearing, and Misreads the Ninth Circuit Opinion.

Doria's argument at pp. 6-9 of its brief against granting the writ is nothing more than a review, from its partisan standpoint, of selected excerpts of testimony in the administrative hearing. In the process, Doria misstates certain testimony, *e.g.*, of the Petitioners' witness Mr. Ed Curtin, and even misstates the holding of the Ninth Circuit Court of Appeals. The holding of the Ninth Circuit quoted at page 6 of Doria's brief, was not reached by that Court after a review of the entire administrative record. Indeed, there is nothing in the opinion of the Ninth Circuit which indicates that the Court undertook to review the entire record in passing on Doria's contentions of error. Petitioners sought a rehearing in the Ninth Circuit based on the very contention urged before this Court, *i.e.*, that considering the evidence as a whole as summarized in the IBLA decision, there was no showing that the "tainted" Exhibit 14-A infected the decision or precluded the agency from thoroughly examining the dispositive issue of whether discoveries of valuable mineral deposits existed within the Doria claims. In this connection, petitioners relied by analogy on the doctrine of nonprejudicial error embodied in the last sentence of

Title 5, U.S.C. §706 which provides that the Court in reviewing agency action:

> ". . . shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Petitioners would further point out that Doria's argument at pp. 7-8 of its brief regarding continuous marketability of its deposits during 1953-1967 is based on a complete non-sequitur. Merely because the Barstow deposits controlled by Owl Rock operated continuously during this time frame and served the Victorville market, which market was also served by the Oro Grande deposits controlled by Mr. Thwing's company, did not mean that Owl Rock could not survive without sales in Victorville. If Doria had attempted to serve the Victorville market, during the 1953-1967 time frame, however, Doria would have been a direct competitor of the Oro Grande and Owl Rock facilities and would have been hampered by the distance and mileage differential of Oro Grande. In addition, Doria overlooks the very limited demand factor during this time frame. As Doria's own expert, Mr. Longfield, explained:

> ". . . Victorville was doing very little, very little market in Victorville until 1965. There was some roadwork and some activity in the Hesperia-Apple Valley area, but these were marginal although there were operators operating up there which certainly constituted a market."

As Mr. Longfield further explained, Doria in the fifties faced the problem of having to interest governmental agencies such as the State and counties in material which was marginal in its specifications and "without

the ability to sell this material on State work it was obvious that a substantial portion you market [sic] from Summit to Victorville . . . would vanish." (RAH 1238.)

Doria, at page 7 of its brief, is bold enough to assert that Petitioners failed to establish a prima facie case regarding the lack of continuous marketability of the subject mining claims. However, the decision of the IBLA in summarizing the testimony of all witnesses adequately refutes Doria's overreaching contention. In any event, the time has long since passed to reargue the weight and sufficiency of the evidence adduced at the validity hearing.

At page 9 Doria also asserts that the plans of Owl Rock to mine the Doria deposits impeached Mr. Schroter's testimony showing the Doria materials as "worthless." To the contrary, Mr. Curtin's testimony corroborated Schroter's evaluation of the quality of the deposits. Mr. Curtin testified that after Owl Rock took an option for a lease agreement with Doria, the company bid all the general contractors for supplying Class No. 2 (not concrete) aggregates, but was unsuccessful in getting any contracts. Thereafter, the option agreement lapsed by its own terms. (RAH 456-457.) Further, in Mr. Curtin's opinion, Owl Rock would *not* have considered the Doria deposits as a feasible site for a commercial aggregate operation. (RAH 458.) This testimony, together with Mr. Longfield's evaluation, confirmed, contrary to Doria's contention, the lack of continuous marketability of the Doria claims.

Doria further asserts that Petitioners fabricated the test results because the investigation of Petitioners' experts disclosed that the deposits satisfied the market-

ability test during the years 1953-1973 (Brief, pp. 8-9). The assertion lacks both accuracy and logic.

Firstly, the investigation of Petitioners' experts Schroter and Thwing regarding the state of the sand and gravel market in the San Bernardino-Victorville area during the relevant time periods wholly belies Doria's contention regarding marketability. See Petition, Appendix "C," IBLA opinion, pp. 27-28. Secondly, logic dictated that the Doria deposits be tested to determine the quality of the material as compared with other deposits in the very limited market which existed in the area of the claims during the fifties and sixties. If, for example, the tests showed high quality material, this would have enhanced Doria's position as a potential competitor even in a limited market. The claims were thus sampled to ascertain whether the material qualified as a "valuable mineral deposit" in the first place, for Petitioners were not prepared to concede to Doria any aspect of validity of the claims.

Doria concludes with a series of gross misstatements —*e.g.*, that Owl Rock negotiated a lease for "1,000,000 metric tons"; and that over 1,000,000 tons of material on the Doria claims were used for the new freeway (I-15) and that the old State highway was built from Doria materials. Each of these assertions is unsupported by the agency record. In fact, Owl Rock's option was initially for 500,000 tons for a three-year period, with an option to renew for another 500,000 tons. (RAH 450.) No one testified in the hearing as to what material was used from the claims to build I-15, much less the amount thereof. With respect to the old highway, Exhibit 16-B introduced by Petitioners at the hearing showed that borrow sites for that project were in fact off the area of the claims.

Conclusion.

Doria's Opposition manifests the improvident result of the Judgment of the Ninth Circuit Court of Appeals. By claiming "foul" as to one item of evidence, Doria passes easily to a review and criticism of other evidence in the agency record, with the result that a *de novo* trial of the entire proceedings is inevitable. This result is not contemplated by the limited scope of agency review conferred on the Courts by Title 5 U.S.C. §706.

Certiorari is essential to guide the Courts below as to appropriate action in the face of allegations of fraud where, as in the instant case, the agency decision is not affected by the claimed fraud.

Respectfully submitted,

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